United States Court of Appeals

for the Second Circuit

APPENDIX

76-7541

United States Court of Appeals

FOR THE SECOND CIRCUIT

DANIEL E. RYAN, Admr. of the Estate of Marvin George Ellsworth Mousseau,
Plaintiff,

vs.

NEW BEDFORD CORDAGE COMPANY, REYNOLDS & SON, INC., VERMONT CONSTRUCTION COMPANY, INC., and GEORGE & ASMUSSEN, LTD.,
Defendants,

VERMONT CONSTRUCTION COMPANY, INC.,
Plaintiff-Appellant,

vs.

JOHNSON INDUSTRIAL PAINTING CONTRACTORS, INC.,
Defendant.

Civil Action No. 73-240.

ALVIN E. MARTIN,
Plaintiff,

vs.

NEW BEDFORD CORDAGE COMPANY, REYNOLDS & SON, INC., VERMONT CONSTRUCTION COMPANY, INC., and GEORGE & ASMUSSEN, LTD.,
Defendants,

VERMONT CONSTRUCTION COMPANY, INC.,
Plaintiff-Appellant,

vs.

JOHNSON INDUSTRIAL PAINTING CONTRACTORS, INC.,
Defendant.

Civil Action No. 74-99.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT IN CIVIL ACTIONS NO. 73-240 AND 74-99.

APPENDIX

MILLER & NORTON,
Attorneys for Defendant-Appellant,
Service Building,
128 Merchants Row,
Rutland, Vermont 05701.

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
20 CENTER ST., BATAVIA, N. Y. 14020
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UNITED STATES COURT OF APPEALS
FILED
FEB 22 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

PAGINATION AS IN ORIGINAL COPY

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Summons—C. A. No. 73-240.

United States District Court

FOR THE

DISTRICT OF VERMONT

CIVIL ACTION FILE NO. 73-240

DANIEL E. RYAN, ADMINISTRATOR OF THE ESTATE OF MARVIN GEORGE ELLSWORTH MOUSSEAU

Plaintiff

v.

NEW BEDFORD CORDAGE COMPANY, REYNOLDS AND SON, INC., AND VERMONT CONSTRUCTION COMPANY

Defendant

SUMMONS

To the above named Defendant :

You are hereby summoned and required to serve upon

WEBSTER & TYLER, ATTYS.

plaintiff's attorney , whose address is

120 North Main Street, St. Albans, Vermont 05478

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

EDWARD J. TRUDELL
Clerk of Court.

BY: LEONARD W. LAFAYETTE
Deputy Clerk.

Date: August 31, 1973
Burlington, Vermont

[Seal of Court]

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

Complaint—C. A. No. 73-240.

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

DANIEL E. RYAN, ADMINISTRATOR OF THE ESTATE OF MARVIN GEORGE ELLSWORTH MOUSSEAU	:	CIVIL ACTION
VS.	:	
NEW BEDFORD CORDAGE COMPANY, REYNOLDS AND SON, INC., AND VERMONT CONSTRUCTION COMPANY	:	DOCKET NO. 73-240

C O M P L A I N T

FIRST COUNT

1. The Plaintiff is a citizen of the State of New York and has been duly appointed Administrator of the Estate of Marvin George Ellsworth Mousseau, late of the Town of Plattsburgh, Clinton County, New York by the Surrogate's Court of the County of Clinton on the 2nd day of November, 1972.

2. Upon information and belief, the Defendant, New Bedford Cordage Company, is a Massachusetts corporation with its principal office and place of business in New Bedford, Massachusetts.

3. Upon information and belief, the Defendant, Reynolds and Son, Inc., is a Vermont corporation with its principal office and place of business in Barre, Vermont.

4. Upon information and belief, the Defendant, Vermont Construction Company, is a duly organized foreign corporation with its principal office and place of business at LaValle, Chomedy Quebec, Canada, and at all times hereinafter mentioned has conducted and still is conducting business in the State of Vermont.

5. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

6. That at all times hereinafter mentioned, New Bedford Cordage Company was engaged in New Bedford, Massachusetts in the manufacture of various kinds of rope, including 3/4 inch diameter

ENDORSED: Filed August 30, 1973 at 4:00 P.M.
LEONARD W. LAFAYETTE
Deputy Clerk

manila rope which it sold to various persons for resale to the general public, said rope being intended by the Defendant, New Bedford Cordage Company, to be used among other things to support scaffolding.

7. That on or about the 12th day of May 1971, Harold Edward Doney, a foreman for Johnson Industrial Painting Contractors, the employer of the Plaintiff's decedent, purchased from the Defendant Reynolds and Son, Inc., a dealer in hardware and construction supplies in Barre, Vermont, a certain length of 3/4 inch diameter manila rope for use by Johnson Industrial Painting Contractors which was designed, manufactured and sold by the Defendant, New Bedford Cordage Company to Reynolds and Son, Inc., for resale to the public.

8. On September 30, 1971, at approximately 11:00 o'clock in the forenoon of that day, the Plaintiff's decedent was employed by Johnson Industrial Painting Contractors as a painter under the supervision and control of the general contractor, the Defendant Vermont Construction Company, working on the Northeastern Vermont Regional Medical Center building in St. Johnsbury, Vermont; that in connection with said work, and while in the scope of his employment, Plaintiff's decedent was on a scaffolding device which device was attached to the building by the said 3/4 inch diameter manila rope. At the said time and place, while Plaintiff's decedent was some 45 feet above the ground, the rope broke, through the negligence and carelessness of the Defendants (and without any negligence on the part of the Plaintiff's decedent contributing thereto), causing the death of the Plaintiff's decedent and the damages hereinafter set forth.

9. The Defendant New Bedford Cordage Company knew or should have known that this rope would be used in the support of scaffolding or other critical uses associated with construction or other fields and in the ordinary course of such use would be

inherently dangerous to the life and limb of persons such as the Plaintiff's decedent and others should it be defective in design and/or manufacture and by placing said rope upon the market, the Defendant, New Bedford Cordage Company represented that it would safely do the job for which it was intended.

10. Said rope made by the Defendant, New Bedford Cordage Company, was, in fact, defective in design and/or manufacture and was wholly unfit and unsafe and inherently dangerous when used for most purposes which 3/4 inch diameter rope would be used for and for such purposes as supporting scaffolding, for which uses it was intended by the Defendant New Bedford Cordage Company in that said rope was weak and lacking in tensile strength so that it was likely to break under loads to which it would be subjected when used for purposes which the Defendant intended.

11. By reason of the Defendant, New Bedford Cordage Company's breach of warranties and as a proximate consequence of the negligence of the said Defendant, in the design, manufacture sale or distribution of the said rope, and the negligence of the Defendant's agents, servants and employees, as a result of the matters aforesaid, Plaintiff's decedent was killed and endured extreme conscious pain and suffering for a time before he died and the Plaintiff avers that the death of the Plaintiff's decedent was caused by the wrongful acts and neglect of the Defendant which was such that if still living, the Plaintiff's decedent would have been entitled to maintain an action therefor. The Plaintiff's decedent was survived by his children, Deborah Ann Mousseau Bonyea, Susan Marie Mousseau, Kathleen Elizabeth Mousseau, and Dean Patrick Mousseau. The said survivors have suffered and will continue to suffer large pecuniary injuries as a result of the aforesaid

negligent and wrongful act of the Defendant.

WHEREFORE, the Plaintiff as Administrator of the Estate of Marvin George Ellsworth Mousseau prays judgment in the amount of $ 600,000.00 and costs.

SECOND COUNT

12. The Plaintiff, Daniel E. Ryan, repeats and realleges each and every allegation in paragraphs of the Complaint heretofore marked and numbered "1", "3", "5", "7", "8", "9" and "10", and he further alleges:

13. That at all times hereinafter mentioned, the Defendant, Reynolds and Son, Inc., was and still is doing business as a retail hardware store and supplier of construction supplies in Barre, Vermont.

14. That Plaintiff's decedent employer purchased said 3/4 inch diameter manila rope for use in supporting scaffolding, of which use the Defendant Reynolds and Son, Inc., had knowledge and then and there the Defendant Reynolds and Son, Inc., impliedly warranted that said rope was fit for the purpose of supporting scaffolding and merchantable in that said rope was of sufficient strength to support such scaffolding without danger or bodily injury or death to Plaintiff's decedent or others.

15. That Plaintiff's decedent employer relied on said warranties and on Defendant Reynolds and Son, Inc.'s skill and judgment in selecting a rope reasonably fit for the purpose for which it was purchased.

16. That said Warranties were not true and the said goods were not of merchantable quality nor fit for the purpose for which they were purchased by Plaintiff's decedent employer, but on the contrary, the rope was not of sufficient strength to support the scaffolding under normal stresses in the purpose for

which it was intended.

17. That the Defendant Reynolds and Son, Inc., was further negligent in failing to properly store and preserve the condition of said 3/4 inch diameter manila rope insofar as such failure allowed the rope to deteriorate and weaken, making it likely to break under loads and stress for which it was intended.

18. The Defendant Reynolds and Son, Inc., was further negligent in failing to inspect said 3/4 inch diameter manila rope for quality and strength and in choosing a supplier of said rope whose product would not perform up to expected safe standards when used as it was intended.

19. Prior to raising the scaffolding to its working position, Plaintiff's decedent and others examined the rope and were unable to detect the latent and dangerous defect and so were unaware of the danger created by such rope while it was used in the manner for which it was intended and which use the Defendant Reynolds and Sons, Inc., had knowledge.

20. By reason of the Defendant, Reynolds and Son, Inc.,'s breach of warranties and as a proximate consequence of the negligence of the said Defendant, in the design, manufacture, sale or distribution of the said rope, and the negligence of the Defendant's agents, servants and employees, as a result of the matters aforesaid, Plaintiff's decedent was killed and endured extreme conscious pain and suffering for a time before he died and the Plaintiff avers that the death of the Plaintiff's decedent was caused by the wrongful acts and neglect of the Defendant which was such that if still living, the Plaintiff's decedent would have been entitled to maintain an action therefor. The Plaintiff's decedent was survived by his children as aforesaid. The said survivors have suffered and will continue to suffer large pecuniary injuries as a result of the aforesaid negligent and wrongful act of the Defendant.

WHEREFORE, the Plaintiff as Administrator of the Estate of Marvin George Ellsworth Mousseau prays judgment in the amount of $ 600,000.00 and costs.

THIRD COUNT

21. That the Plaintiff, Daniel E. Ryan, repeats and re-alleges each and every allegation in paragraphs of the Complaint heretofore marked and numbered "1", "4", "5", "7", "8", and he further alleges:

22. That the Defendant Vermont Construction Company was on September 30, 1971 the general contractor with supervision and control over the work being done on the building of the Northeastern Vermont Regional Medical Center in St. Johnsbury, Vermont, such work including the work done by Johnson Industrial Painting Contractors and the Plaintiff's decedent.

23. That the Defendant Vermont Construction Company knew that Plaintiff's decedent's duties necessitated the use of scaffolding equipment and that Plaintiff's decedent was, in fact, using such scaffolding equipment on September 30, 1971.

24. That the use of scaffolding is intrinsically dangerous and in its nature calculated to cause injury to workment thereon unless precautions (such as safety harnesses, safety lines, protective head gear, and the use of other such scaffolding safety devices) were taken. No such precautions were taken by the Defendant at the time of the accident which resulted in the death of Plaintiff's decedent.

25. That the scaffolding work was unlawful in that the Defendant, Vermont Construction Company, failed to provide for the safety of the Plaintiff's decedent as required by the Occupational Safety and Health Act. That the Defendant Vermont Construction Company's negligent failure to comply with the provisions of this Law and their failure to otherwise provide for the safety of the Plaintiff's decedent according to such other

statutes, codes and regulations and common law duties as may have been applicable to the work carried on under the direction, supervision and control of Vermont Construction Company at the time and place aforesaid caused and/or contributed to the injuries and loss of life of the Plaintiff's decedent and the damages sustained by the Plaintiff's decedent's estate.

26. As a proximate consequence of the negligence of the said Defendant and the negligence of the Defendant's agents, servants and employees, and as a result of the matters aforesaid Plaintiff's decedent was killed and endured extreme conscious pain and suffering for a time before he died and the Plaintiff avers that the death of the Plaintiff's decedent was caused by the wrongful acts and neglect of the Defendant which was such that if still living the Plaintiff's decedent would have been entitled to maintain an action therefor. The Plaintiff's decedent was survived by his children as aforesaid. The said survivors have suffered and will continue to suffer large pecunicary injuries as a result of the aforesaid negligent and wrongful act of the Defendant.

WHEREFORE, the Plaintiff as Administrator of the Estate of Marvin George Ellsworth Mousseau prays judgment in the amount of $ 600,000.00 and costs.

PLAINTIFF REQUESTS TRIAL BY JURY

Dated at St. Albans, Vermont this 30TH day of AUGUST, 1973.

DANIEL E. RYAN, ADMINISTRATOR OF THE ESTATE OF MARVIN GEORGE ELLSWORTH MOUSSEAU

BY

WEBSTER & TYLER, ATTYS.

By: Lawrence H. Bruce, Jr.

Lawrence H. Bruce, Jr.
A Member of the Firm

9

Summons—C. A. No. 74-99.

United States District Court

FOR THE

CIVIL ACTION FILE NO. 74-99

ALVIN E. MARTIN

Plaintiff

v.

NEW BEDFORD CORDAGE CO.
REYNOLDS & SON, INC., AND
VERMONT CONSTRUCTION CO.

Defendant

SUMMONS

To the above named Defendant :

You are hereby summoned and required to serve upon

E. J. Tyler III, Esq.

plaintiff's attorney , whose address

120 North Main Street, St. Albans, Vermont 05478

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Edward F. Trudell
Clerk of Court.

Deputy Clerk.

Date: APR 9 1974

[Seal of Court]

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

Summons—C. A. No. 74-99.

U.S. MARSHALS SERVICE
INSTRUCTION AND PROCESS RECORD

INSTRUCTIONS: See "INSTRUCTIONS FOR SERVICE OF PROCESS BY THE U.S. MARSHAL" on the reverse of the last (*No. 5*) copy of this form. Please type or print legibly, insuring readability of all copies. Do not detach any copies.

PLAINTIFF | COURT NUMBER

DEFENDANT | TYPE OF WRIT

SERVE | NAME OF INDIVIDUAL, COMPANY, CORPORATION, ETC., TO SERVE OR DESCRIPTION OF PROPERTY TO SEIZE OR CONDEMN

AT | ADDRESS (*Street or RFD, Apartment No., City, State and ZIP Code*)

SEND NOTICE OF SERVICE COPY TO NAME AND ADDRESS BELOW:

Show number of this writ and total number of writs submitted, i.e., 1 of 1, 1 of 3, etc. | NO. | OF | TOTAL

CHECK IF APPLICABLE:

☐ One copy for U. S. Attorney or designee and two copies for Attorney General of the U. S. included.

SHOW IN THE SPACE BELOW AND TO THE LEFT ANY SPECIAL INSTRUCTIONS OR OTHER INFORMATION PERTINENT TO SERVING THE WRIT DESCRIBED ABOVE.

SPECIAL INSTRUCTIONS:

NAME AND SIGNATURE OF ATTORNEY OR OTHER ORIGINATOR | TELEPHONE NUMBER | DATE

SPACE BELOW FOR USE OF U.S. MARSHAL ONLY - DO NOT WRITE BELOW THIS LINE

Show amount of deposit (*or applicable code*) and sign USM-285 for first writ only if more than one writ submitted. | DEPOSIT/CODE | DIST. OF ORIGIN | DISTRICT TO SERVE | LOCATION OF SUB-OFFICE OF DIST. TO SERVE

I acknowledge receipt for the total number of writs indicated and for the deposit (*if applicable*) shown. | SIGNATURE OF AUTHORIZED USMS DEPUTY OR CLERK | DATE

☒ I hereby certify and return that I have personally served, have legal evidence of service, or have executed as shown in "REMARKS," the writ described on the individual, company, corporation, etc., at the address shown above or on the individual, company, corporation, etc., at the address inserted below.

☐ I hereby certify and return that, after diligent investigation, I am unable to locate the individual, company, corporation, etc., named above within this Judicial District.

NAME AND TITLE OF INDIVIDUAL SERVED (*If not shown above*) | ☐ A person of suitable age and discretion then abiding in the defendant's usual place of abode.

ADDRESS (*Complete only if different than shown above*) | FEE (*If applicable*) | MILEAGE

$ | $

DATE(S) OF ENDEAVOR (*Use Remarks if necessary*) | DATE OF SERVICE | TIME | SIGNATURE OF U.S. MARSHAL OR DEPUTY

4-24-74 | 3:45 PM

REMARKS

USM 285 (Ed. 7-1-70) **5. RECEIPT**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

ALVIN E. MARTIN :
:
-vs- :
:
NEW BEDFORD CORDAGE CO., :
REYNOLDS & SON, INC. and :
VERMONT CONSTRUCTION CO. :

CIVIL ACTION
File No. 74-99

- COMPLAINT -

FIRST COUNT

1. The Plaintiff is a citizen of the State of New York.

2. Upon information and belief, the Defendant, New Bedford Cordage Company, is a Massachusetts corporation with its principal office and place of business in New Bedford, Massachusetts.

3. Upon information and belief, the Defendant, Reynolds and Son, Inc., is a Vermont corporation with its principal office and place of business in Barre, Vermont.

4. Upon information and belief, the Defendant, Vermont Construction Company, is a duly organized foreign corporation with its principal office and place of business at LaValle, Chomedy, Quebec, Canada, and at all times hereinafter mentioned has conducted and still is conducting business in the State of Vermont.

5. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000.00).

6. That at all times hereinafter mentioned, New Bedford Cordage Company was engaged in New Bedford, Massachusetts, or elsewhere in the manufacture of various kinds of rope, including 3/4 inch diameter manila rope which it sold to various persons for resale to the general public, said rope being intended by the Defendant, New Bedford Cordage Company, to be used among other things to support scaffolding.

7. That on or about the 12th day of May, 1971, Harold Edward Doney, a foreman for Johnson Industrial Painting Contractors, the employer of the Plaintiff purchased from the Defendant, Reynolds and Son, Inc., a dealer in hardware and

WEBSTER & TYLER
ATTORNEYS
120 NORTH MAIN STREET
ST. ALBANS, VT. 05478

construction supplies in Barre, Vermont, a certain length of 3/4 inch diameter manila rope for use by Johnson Industrial Painting Contractors which was designed, manufactured and sold by the Defendant, New Bedford Cordage Company to Reynolds and Son, Inc., for resale to the public.

8. On September 30, 1971, at approximately 11.00 o'clock in the forenoon of that day, the Plaintiff was employed by Johnson Industrial Painting Contractors as a painter under the supervision and control of the general contractor, the Defendant Vermont Construction Company, working on the Northeastern Vermont Regional Medical Center building in St. Johnsbury, Vermont, that in connection with said work, and while in the scope of his employment, Plaintiff was on a scaffolding device which device was attached to the building by the said 3/4 inch diameter manila rope. At the said time and place, while Plaintiff was some 45 feet above the ground, the rope broke, through the negligence and carelessness of the Defendants causing the injuries hereinafter set forth.

9. The Defendant, New Bedford Cordage Company, knew or should have known that this rope would be used in the support of scaffolding or other critical uses associated with construction or other fields and in the ordinary course of such use would be inherently dangerous to the life and limb of persons such as the Plaintiff and others should it be defective in design and/or manufacture and by placing said rope upon the market, the Defendant, New Bedford Cordage Company, represented that it would safely do the job for which it was intended.

10. Said rope made by the Defendant, New Bedford Cordage Company, was, in fact, defective in design and/or manufacture and was wholly unfit and unsafe and inherently dangerous when used for most purposes which 3/4 inch diameter rope would be

used for and for such purposes as supporting scaffolding, for which uses it was intended by the Defendant New Bedford Cordage Company in that said rope was weak and lacking in tensile strength so that it was likely to break under loads to which it would be subjected when used for purposes which the Defendant intended.

11. Defendant, New Bedford Cordage Company knew that the rope would be used without inspection for defects in design or manufacture. Plaintiff was unaware of the defect or defects in the rope which rendered it unsafe for its intended use to support scaffolding.

12. By reason of the Defendant, New Bedford Cordage Company's breach of warranties and as a proximate consequence of the negligence of the said Defendant in the design, manufacture, sale and distribution of the said rope, and the negligence of the Defendant's agents, servants and employees, and as a result of the matters set forth above, Plaintiff fell to the ground and suffered severe injuries of the neck, back and arm. He suffered and will continue to suffer pain and discomfort, as well as an intense fear of heights. He incurred medical expenses and will continue to incur medical expenses in the future. He suffered and will suffer discontinuity of employment and inpairment of earning capacity.

WHEREFORE, the Plaintiff prays judgment in the amount of Forty Thousand Dollars ($40,000.00) and costs.

SECOND COUNT

13. The Plaintiff, Alvin E. Martin, repeats and realeges each and every allegation in paragraphs of the Complaint heretofore marked and numbered 1, 3, 5, 7, 8, 9, 10 and he further alleges:

14. That at all times hereinafter mentioned, the Defendant, Reynolds and Son, Inc., was and still is doing business as a retail hardware store and supplier of construction supplies in Barre, Vermont.

15. That Plaintiff's employer purchased said 3/4 inch diameter manila rope for use in supporting scaffolding, of which use the Defendant Reynolds and Son, Inc., had knowledge and then and there the Defendant Reynolds and Son, Inc. impliedly warranted that said rope was fit for the purpose of supporting scaffolding and merchantable in that said rope was of sufficient strength to support such scaffolding without danger of bodily injury or death to Plaintiff or others.

16. That Plaintiff's employer relied on said warranties and on Defendant Reynolds and Son, Inc.'s skill and judgment in selecting a rope reasonably fit for the purpose for which it was purchased.

17. That said Warranties were not true and the said goods were not of merchantable quality nor fit for the purpose for which they were purchased by Plaintiff's employer, but on the contrary, the rope was not of sufficient strength to support the scaffolding under normal stresses in the purpose for which it was intended.

18. That the Defendant Reynolds and Son, Inc., was further negligent in failing to properly store and preserve the condition of said 3/4 inch diameter manila rope insofar as such failure allowed the rope to deteriorate and weaken, making it likely to break under loads and stress for which it was intended.

19. The Defendant Reynolds and Son, Inc., was further negligent in failing to inspect said 3/4 inch diameter manila rope for quality and strength and in choosing a supplier of said rope whose product would not perform up to expected safe

standards when used as it was intended.

20. Prior to raising the scaffolding to its working position, Plaintiff and others examined the rope and were unable to detect the latent and dangerous defect and so were unaware of the danger created by such rope while it was used in the manner for which it was intended and which use the Defendant Reynolds and Sons , Inc., had knowledge.

21. By reason of the Defendant, Reynolds and Son, Inc.'s breach of warranties and as a proximate consequence of the negligence of the said Defendant, in the design, manufacture, sale or distribution of the said rope, and the negligence of the Defendant's agents, servants and employees, and as a result of the matters set forth above, Plaintiff fell to the ground and suffered severe injuries of the neck, back and arm. He suffered and will continue to suffer pain and discomfort, as well as an intense fear of heights. He incurred medical expenses and will continue to incur medical expenses in the future. He suffered and will suffer discontinuity of employment and impairment of earning capacity.

WHEREFORE, the Plaintiff prays judgment in the amount of Forty Thousand Dollars ($40,000.00) and costs.

THIRD COUNT

22. The Plaintiff, Alvin E. Martin, repeats and realeges each and every allegation in paragraphs of the Complaint heretofore marked and numbered "1, 4, 5, 7 and 8" and he further alleges:

23. That the Defendant Vermont Construction Company was on September 30, 1971 the general contractor with supervision and control over the work being done on the building of the Northeastern Vermont Regional Medical Center in St. Johnsbury, Vermont, such work including the work done by Johnson Industrial Painting Contractors and the Plaintiff's decedent.

24. That the Defendant Vermont Construction Company knew that Plaintiff's duties necessitated the use of scaffolding equipment and that Plaintiff was, in fact, using such scaffolding equipment on September 30, 1971.

25. That the use of scaffolding is intrinsically dangerous and in its nature calculated to cause injury to workmen thereon unless precautions (such as safety harnesses, safety lines, protective head gear, and the use of other such scaffolding safety devices) were taken. No such precautions were taken by the Defendant at the time of the accident which resulted in the injuries sustained by the Plaintiff.

26. That the scaffolding work was unlawful in that the Defendant, Vermont Construction Company, failed to provide for the safety of the Plaintiff as required by the Occupational Safety and Health Act. That the Defendant, Vermont Construction Company's negligent failure to comply with the provisions of this Law and their failure to otherwise provide for the safety of the Plaintiff according to such other statutes, codes and regulations and common law duties as may have been applicable to the work carried on under the direction, supervision and control of Vermont Construction Company at at the time and place aforesaid caused and/or contributed to the injuries sustained by the Plaintiff.

27. As a proximate consequence of the negligence of the said Defendant and the negligence of the Defendant's agents, servants and employees, and as a result of the matters aforesaid, Plaintiff fell to the ground and suffered severe injuries of the neck, back and arm. He suffered and will continue to suffer pain and discomfort, as well as an intense fear of heights. He incurred medical expenses and will continue to incur medical expenses in the future. He suffered and will suffer discontinuity of employment and impairment of earning capacity.

WHEREFORE, the Plaintiff prays judgment in the amount of Forty Thousand Dollars ($40,000.00) and costs.

Plaintiff requests trial by jury.

DATED at St. Albans, Vermont, this 25th day of March, 1974.

s/C. J. Tyler, III

C. J. Tyler, III
Attorney for the Plaintiff
WEBSTER & TYLER, ATTYS.
120 North Main Street
St. Albans, VT 05478

Defendant's Answer—C. A. No. 73-240.

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

DANIEL E. RYAN, ADMINISTRATOR OF THE ESTATE OF MARVIN GEORGE ELLSWORTH MOUSSEAU	)	Civil Action
vs.	)	Docket No. 73-240
NEW BEDFORD CORDAGE COMPANY, REYNOLDS AND SON, INC., AND VERMONT CONSTRUCTION COMPANY	)	

NOTICE OF APPEARANCE

Please enter the appearance of Miller & Hill for the defendant, Vermont Construction Company.

By LAWRENCE MILLER

Miller & Hill
128 Merchants Row
Rutland, Vermont

DEFENDANT'S ANSWER

First Count

1. The allegations are denied for lack of sufficient information upon which to base a different answer.

2. These allegations are not directed to this defendant and require no answer of it.

3. These allegations are not directed to this defendant and require no answer of it.

4. These allegations are denied at this time for lack of sufficient information upon which to base a different answer.

5. Denied.

6. These allegations are not directed to this defendant and require no answer of it.

MILLER AND HILL
ATTORNEYS AT LAW
128 MERCHANTS ROW
RUTLAND, VERMONT

7. These allegations are not directed to this defendant and require no answer of it.

8. The allegations of this paragraph are denied for lack of sufficient information upon which to base a different answer.

9. These allegations are not directed to this defendant and require no answer of it.

10. These allegations are not directed to this defendant and require no answer of it.

11. These allegations are not directed to this defendant and require no answer of it.

Any and all allegations in Count One not specifically admitted are expressly denied.

Second Count

12. The defendant Vermont Construction Company repeats and realleges each and every answer to the paragraphs of the Complaint heretofore marked and numbered 1, 3, 5, 7, 8, 9 and 10.

13-20. The allegations of these paragraphs are not directed to this defendant and require no answer of it; however, in the event that any of such allegations are construed as alleging acts of negligence or breaches of warranty on the part of this defendant, then, in that event, they are expressly denied.

Third Count

21. This defendant, Vermont Construction Company, repeats and reanswers each and every answer in paragraphs of the Complaint heretofore marked and numbered 1, 4, 5, 7, and 8.

22. The allegations of this paragraph are denied at this time for lack of sufficient information upon which to base a different answer.

MILLER AND HILL
ATTORNEYS AT LAW
126 MERCHANTS ROW
RUTLAND, VERMONT

23. The allegations of this paragraph of the complaint are denied for lack of sufficient information upon which to base a different answer.

24. The allegations of this paragraph are conclusions of law which do not require any answer on the part of this defendant; however, in the event they are construed as allegations of negligence, then they are specifically denied.

25. Denied.

26. Denied.

27. Any and all allegations whether in Count One, County Two or County Three of this complaint not herein specifically admitted are expressly denied.

AFFIRMATIVE DEFENSES

I

The defendant alleges that any damages the plaintiff claims to have sustained were proximately caused, or contributed to by the plaintiff's own negligence, and that such negligence on the part of the plaintiff was greater than any claimed causal negligence on the part of the defendant.

And further without admitting any negligence on the part of the defendant, the defendant alleges that any damages the plaintiff claims to have sustained are diminishable in proportion to the amount of negligence attributable to the plaintiff.

II

The defendant alleges that the claimed accident, injuries, and damage to the plaintiff were due to the plaintiff assuming the risk of the conditions and circumstances allegedly causing the same.

MILLER AND HILL
ATTORNEYS AT LAW
128 MERCHANTS ROW
RUTLAND, VERMONT

III

The complaint fails to state a cause of action against Vermont Construction Company upon which legal relief can be granted.

DEMAND FOR JURY TRIAL

The defendant demands a jury trial on all issues.

Dated this 19th day of October, 1973.

MILLER & HILL

By LAWRENCE MILLER
128 Merchants Row
Rutland, Vermont

CERTIFICATE OF SERVICE

I, Lawrence Miller, hereby certify that on the 19th day of October 19, 1973, I served the foregoing Notice of Appearance, Defendant's Answer and Demand for Jury Trial upon the following:

Webster & Tyler, Esqs.
120 North Main Street
St. Albans, Vermont
Attorneys for the Plaintiff

Dinse, Allen & Erdmann, Esqs.
186 College Street
Burlington, Vermont
Attorneys for New Bedford Cordage Co.

Lawrence Miller

Motion to Amend Answer—C. A. No. 73-240.

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

DANIEL E. RYAN, ADMINISTRATOR OF THE ESTATE OF MARVIN GEORGE ELLSWORTH MOUSSEAU	)	Civil Action
vs.	)	Docket No. 73-240
NEW BEDFORD CORDAGE COMPANY, REYNOLDS AND SON, INC., and VERMONT CONSTRUCTION COMPANY	)	

MOTION TO AMEND ANSWER

NOW COMES the Vermont Construction Company by and through its attorneys and move to amend its answer heretofore filed in said cause by adding the following affirmative defense:

IV

Any obligation on the part of Vermont Construction Company to the plaintiff's decedent or his dependents is governed exclusively by the Vermont Workmen's Compensation Act as found in 21 V.S.A. §§ 601 et seq. as amended and that such rights and remedies granted by the provisions of 21 V.S.A. §§ 601 et seq., as amended, exclude all other rights and remedies of such employee, his personal representative, dependents or next of kin, at common law or otherwise on account of such injury including the claim set forth in the plaintiff's complaint herein.

Dated this 27th day of March, 1974.

MILLER & HILL

By LAWRENCE MILLER
128 Merchants Row
Rutland, Vermont, 05701

MILLER AND HILL
ATTORNEYS AT LAW
128 MERCHANTS ROW
RUTLAND, VERMONT

CERTIFICATE OF SERVICE

I, Lawrence Miller, hereby certify that on the 27th day of March, 1974, I served the foregoing Motion to Amend Answer upon Webster & Tyler, Esqs., 120 North Main Street, St. Albans, Vermont, attorneys for the Plaintiff; Dinse, Allen & Erdmann, Esqs., 186 College Street, Burlington, Vermont, attorneys for New Bedford Cordage Company; and, Pierson, Affolter & Amidon, Esqs., 253 South Union Street, Burlington, Vermont, attorneys for Reynolds and Son, Inc.

LAWRENCE MILLER
Lawrence Miller

MILLER AND HILL
ATTORNEYS AT LAW
128 MERCHANTS ROW
RUTLAND, VERMONT

**Memorandum in Support of Motion to Amend—
C. A. No. 73-240.**

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

DANIEL E. RYAN, ADMINISTRATOR OF THE ESTATE OF MARVIN GEORGE ELLSWORTH MOUSSEAU	)	Civil Action
vs.	)	Docket No. 73-240
NEW BEDFORD CORDAGE COMPANY, REYNOLDS AND SON, INC., and VERMONT CONSTRUCTION COMPANY	)	

MEMORANDUM IN SUPPORT
OF MOTION TO AMEND

FACTS

During the course of discovery in the above entitled matter through the use of Interrogatories and answers filed in respect thereto, it has been determined by attorneys for Vermont Construction Company that an additional defense would be available to this defendant based on the allegations and the facts as discovered in the above entitled matter. Wherefore attorneys for the Vermont Construction Company have filed a Motion to Amend its answer to include the additional defense as stated in its Motion to Amend. Discovery is still being had in said matter and so no prejudice should result to the plaintiff if this Motion is granted by the court in its discretion.

AUTHORITY

Rule 15 of the Federal Rules of Civil Procedure states that amendments such as the one requested by defendant Vermont Construction Company may be made by leave of court which shall be freely given when justice so requires. Green vs. Wolf Corporation, D.C. N.Y. 1970, 50 F.R.D. 220. The

MILLER AND HILL
ATTORNEYS AT LAW
136 MERCHANTS ROW
RUTLAND, VERMONT

underlying basis of Rule 15 (a) is to allow liberal pleading so that cases can be decided on their merits rather than having the pleadings be an end in themselves. In this particular case no prejudice should result to the plaintiff by the amendment requested in the Motion as discovery is not yet complete and the plaintiff has ample time in which to avail itself of appropriate discovery so that it may be prepared at the time of trial to have the case decided upon its merits, if the amendment is allowed.

In Donnelly Garment Company vs. International Ladies' Garment Workers' Union, D.C. Mo. 1941, 47 F. Supp. 61, 63, it was stated that "when any defendant appears generally in an action, he is deemed to have made an appearance with the knowledge that amendments are liberally granted and will be allowed and freely given when justice requires it." The logic of this rule should apply also to plaintiffs who institute actions in the Federal Court.

It has been held that Rule 15 (a) allows a party to amplify a previous pleading so as to include an additional defense. Scott vs. Crescent Tool Company, D.C. Ga., 1969, 306 F. Supp. 884. In commenting on Rule 15 (a) it has been stated that a liberal policy toward allowing amendments to correct errors in pleadings clearly is a desireable and further is one of the basic objectives of the Federal Rules - the determination of cases on their merits. (Wright and Miller, Federal Practice and Procedure, Volume 6, Page 381).

Dated this 27th day of March, 1974.

MILLER & HILL

By LAWRENCE MILLER
128 Merchants Row
Rutland, Vermont 05701

MILLER AND HILL
ATTORNEYS AT LAW
128 MERCHANTS ROW
RUTLAND, VERMONT

CERTIFICATE OF SERVICE

I, Lawrence Miller, hereby certify that on the 27th day of March, 1974, I served the foregoing Memorandum in Support of Motion to Amend upon Webster & Tyler, Esqs., 120 North Main Street, St. Albans, Vermont, attorneys for the Plaintiff; Dinse, Allen & Erdmann, Esqs., 186 College Street, Burlington, Vermont, attorneys for New Bedford Cordage Company; and, Pierson, Affolter & Amidon, Esqs., 253 South Union Street, Burlington, Vermont, attorneys for Renolds and Son, Inc.

LAWRENCE MILLER

Lawrence Miller

MILLER AND HILL
ATTORNEYS AT LAW
128 MERCHANTS ROW
RUTLAND, VERMONT

Defendant's Answer—C. A. No. 74-99.

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

ALVIN E. MARTIN	)	
	)	Civil Action
	)	
v.	)	File No. 74-99
	)	
	)	
NEW BEDFORD CORDAGE CO.	)	
REYNOLDS & SON, INC., and	)	
VERMONT CONSTRUCTION CO.	)	

NOTICE OF APPEARANCE

Please enter the appearance of Miller & Hill for the defendant Vermont Construction Company.

By LAWRENCE MILLER
Miller & Hill
128 Merchants Row
Rutland, Vermont

DEFENDANT'S ANSWER

FIRST COUNT

1. The allegations of Paragraph 1 are denied for lack of sufficient information upon which to base a different answer.

2-3. The allegations of Paragraphs 2 and 3 are not directed to this defendant and require no answer of it.

4. Admitted.

5. Denied.

6-7. The allegations of Paragraphs 6 and 7 are not directed to this defendant and require no answer of it.

8. The allegations of Paragraph 8 are denied for lack of sufficient information upon which to base a different answer.

9-11. The allegations of Paragraphs 9, 10 and 11 are not directed to this defendant and require no answer of it.

12. In so far as any of the allegations of Paragraph 12 impliedly relate to Vermont Construction Company, they are denied.

SECOND COUNT

13. Defendant Vermont Construction Company reanswers each and every answer to paragraphs of the complaint heretofore marked and numbered 1, 3, 5, 7, 8, 9, and 10.

14-21. The allegations of Paragraphs 14, 15, 16, 17, 18, 19, 20, and 21 are not directed to this defendant and require no answer of it.

THIRD COUNT

22. The defendant Vermont Construction Company reanswers each and every answer to paragraphs of the complaint heretofore marked and numbered 1, 4, 5, 7, and 8.

23. Defendant Vermont Construction Company admits only that on September 30, 1971 it was the general contractor on a project known as Northeastern Vermont Regional Medical Center in St. Johnsbury, Vermont. Any and all other allegations of Paragraph 23 are denied.

24-25. The allegations of Paragraphs 24 and 25 are denied for lack of sufficient information upon which to base a different answer.

26. Denied.

27. The allegations of Paragraph 27 are denied.

28. Any and all other allegations whether in Count 1, Count II, Count III or elsewhere in the complaint not specifically admitted herein are denied.

MILLER AND HILL
ATTORNEYS AT LAW
120 MERCHANTS ROW
RUTLAND, VERMONT

Defendant's Answer—C. A. No. 74-99.

AFFIRMATIVE DEFENSES

I

This defendant alleges that any damages the plaintiff claims to have sustained were proximately caused, or contributed to by the plaintiff's own negligence, and that such negligence on the part of the plaintiff was greater than any claimed causal negligence on the part of the defendant.

And further without admitting any negligence on the part of this defendant, this defendant alleges that any damages the plaintiff claims to have sustained are diminishable in proportion to the amount of negligence attributable to the plaintiff.

II

This defendant alleges that the claimed acc dent, injuries, and damage to the plaintiff were due to the plaintiff assuming the risk of the conditions and circumstances allegedly causing the same.

III

The complaint fails to state a cause of action against Vermont Construction Company upon which legal relief can be granted.

IV

Any obligation on the part of Vermont Construction Company to the plaintiff is governed exclusively by the Vermont Workmen's Compensation Act as found in 21 V.S.A. §601 et seq., as amended, and that such rights and remedies granted by the provisions of 21 V.S.A. §601 et seq., as amended, exclude all other rights and remedies of such employee at common law or otherwise on account of such injury including the claim set forth in the plaintiff's complaint herein.

MILLER AND HILL
ATTORNEYS AT LAW
128 MERCHANTS ROW
RUTLAND, VERMONT

V

The complaint, the process and service of process are not in accordance with the rules of practice, procedure, and applicable law.

DEMAND FOR JURY TRIAL

This defendant demands a jury trial on all issues.

Dated this 29th day of April, 1974.

MILLER & HILL

By LAWRENCE MILLER
128 Merchants Row
Rutland, Vermont 05701

CERTIFICATE OF SERVICE

I, Lawrence Miller, attorney for the defendant Vermont Construction Company in the above entitled action, whose address is Service Building, 128 Merchants Row, Rutland, Vermont, hereby certify that on the 29th day of April, 1974, I served the foregoing Notice of Appearance, Defendant's Answer and Demand for Jury Trial upon E. J. Tyler, III, Esq., 120 North Main Street, St. Albans, Vermont, 05478, by depositing a copy thereof in the United States mail, postage prepaid, addressed to him as stated above.

LAWRENCE MILLER
Lawrence Miller

Summons—C. A. No. 73-240.

United States District Court

FOR THE

DISTRICT OF VERMONT

CIVIL ACTION FILE NO. 73-240

Daniel E. Ryan, Administrator of the Estate of Marvin George Ellsworth Mousseau

Plaintiff

v.

New Bedford Cordage Company, Reynolds and Son, Inc., and Vermont Construction Company

Vermont Construction, Inc.

Defendant and Third-Party Plaintiff

v.

Johnson Industrial Painting Contractors

Third-Party Defendant

SUMMONS

To the above-named Third-Party Defendant: Johnson Industrial Painting Contractors

You are hereby summoned and required to serve upon Miller and Hill, Esqs.

plaintiff's attorney whose address is

and upon

attorneys for the above-named defendant and third-party plaintiff, and whose address is

128 Merchants Row, Rutland, Vermont 05701

an answer to the third-party complaint which is herewith served upon you within 20 days after the service of this summons upon you exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the third-party complaint. There is also served upon you herewith a copy of the complaint of the plaintiff which you may but are not required to answer.

EDWARD J. TRUDELL

Clerk of the Court.

By Germaine R. Atherton

Deputy Clerk.

Dated: July 12, 1974
Burlington, Vt.

[Seal of Court]

Note.—This summons is issued pursuant to Rule 14 of the Federal Rules of Civil Procedure.

FPI 880—6-14-61-148-6770

BEST COPY AVAILABLE

Summons—C. A. No. 73-240.

U.S. MARSHALS SERVICE
INSTRUCTION AND PROCESS RECORD

INSTRUCTIONS: See "INSTRUCTIONS FOR SERVICE OF PROCESS BY THE U.S. MARSHAL" on the reverse of the last (No. 5) copy of this form. Please type or print legibly, insuring readability of all copies. Do not detach any copies.

PLAINTIFF: Daniel E Ryan, Admx. — COURT NUMBER: 73-240

DEFENDANT: New Bedford Portland Co. — TYPE OF WRIT: Sum

SERVE: NAME OF INDIVIDUAL, COMPANY, CORPORATION, ETC. TO SERVE OR DESCRIPTION OF PROPERTY TO SEIZE OR CONDEMN: TPI Johnson & [illegible]

AT: ADDRESS (Street or RFD, Apartment No., City, State and ZIP Code): P.O. Box 865, [illegible] VT. 12901

SEND NOTICE OF SERVICE COPY TO NAME AND ADDRESS BELOW:

Miller & Hill. Esqs.
128 Merchants Row
Rutland VT. 05761

Show number of this writ and total number of writs submitted, i.e., 1 of 1, 1 of 3, etc. — NO. 1 — TOTAL 1

CHECK IF APPLICABLE.
☐ One copy for U. S. Attorney or Assistant and two copies for Attorney General of the U.S. included.

SHOW IN THIS SPACE BELOW AND TO THE LEFT ANY SPECIAL INSTRUCTIONS OR OTHER INFORMATION PERTINENT TO SERVING THE WRIT DESCRIBED ABOVE.

SPECIAL INSTRUCTIONS:

NAME AND SIGNATURE OF ATTORNEY OR OTHER ORIGINATOR: Miller & Hill — TELEPHUNE NUMBER: 775-2521 — DATE:

SPACE BELOW FOR USE OF U.S. MARSHAL ONLY - DO NOT WRITE BELOW THIS LINE

I show amount of deposit (or applicable code) and sign USM-285 for first writ only if more than one writ submitted. — DEPOSIT/CODE — DISTRICT TO SERVE — LOCATION OF SUB-OFFICE OF DIST. TO SERVE

I acknowledge receipt for the total number of writs indicated and for the deposit (if applicable) shown. — SIGNATURE OF AUTHORIZED USMS DEPUTY OR CLERK — DATE 7-15-74

☒ I hereby certify and return that I have personally served, have legal evidence of service, or have executed as shown in "REMARKS," the writ described on the individual, company, corporation, etc., at the address shown above or on the individual, company, corporation, etc., at the address inserted below.

☐ I hereby certify and return that, after diligent investigation, I am unable to locate the individual, company, corporation, etc., named above within this Judicial District.

NAME AND TITLE OF INDIVIDUAL SERVED (If not shown above): Richard C Thomas — ☐ A person of suitable age and discretion then residing in the defendant's usual place of abode.

ADDRESS (Complete only if different than shown above): Manchester VT. 05607

FEE (If applicable): $ — MILEAGE: $

DATE(S) OF ENDEAVOR (Use Remarks if necessary) — DATE OF SERVICE: 7/19/74 — TIME: 2:10 AM/PM — SIGNATURE OF U.S. MARSHAL OR DEPUTY

REMARKS:
Paid Sec. State Fee $5.00
Copy Certified mail to Atty Miller

Third-Party Complaint—C. A. No. 73-240.

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

DANIEL E. RYAN, ADMINISTRATOR	)	
	)	
vs.	)	
	)	
NEW BEDFORD CORDAGE COMPANY, REYNOLDS & SON, INC. and VERMONT CONSTRUCTION, INC.	)	Civil Action No. 73-240
	)	
VERMONT CONSTRUCTION, INC. Third-Party Plaintiff	)	
	)	
vs.	)	
	)	
JOHNSON INDUSTRIAL PAINTING CONTRACTORS, Third-Party Defendant	)	

THIRD-PARTY COMPLAINT

The Plaintiff, Daniel E. Ryan, Administrator of the Estate of Marvin George Ellsworth Mousseau, has filed against the Defendant, Vermont Construction, Inc., a complaint, a copy of which is attached hereto as "Exhibit B".

Defendant, Vermont Construction, Inc. as third-party plaintiff, brings this, its third-party complaint against Johnson Industrial Painting Contractors of P.O. Box 865, Plattsburgh, New York, and alleges as follows:

1.) Johnson Industrial Painting Contractors was a New York corporation, doing business in the State of Vermont on or about September 30, 1971, the date upon which Marvin George Ellsworth Mousseau, deceased, was killed as the result of an accident as alleged in "Exhibit B".

2.) At the time of the said accident which allegedly resulted in the death of the said Marvin George Ellsworth Mousseau, he was an employee of Johnson Industrial Painting

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128 MERCHANTS ROW
RUTLAND, VERMONT

Contractors and engaged in work for them on the Northeastern Vermont Regional Medical Center building in St. Johnsbury, Vermont.

3.) That Johnson Industrial Painting Contractors had entered into a written contract with Vermont Construction Inc. relating to the work being performed by Marvin George Ellsworth Mousseau and others at the time of the alleged accident resulting in the death of the said Marvin George Ellsworth Mousseau. A copy of said contract is attached hereto and made a part hereof, designated as "Exhibit C".

4.) That pursuant to the terms of "Exhibit C", Johnson Industrial Painting Contractors agreed, inter alia,

(a) That all the work would be executed under the superintendence of a qualified foreman.

(b) That the general conditions, drawings and specifications specified in the contract between Vermont Construction Inc. and Northeastern Vermont Regional Hospital, Inc. formed a part of the contract between Vermont Construction, Inc. and Johnson Industrial Painting Contractors.

(c) That it would maintain insurance coverage for an amount sufficient to cover any claims for property damages and personal injuries including death suffered by any person as a result of its operation under the contract.

(d) That it warranted to comply with all federal, state and local laws in the performance of work under "Exhibit C".

5. It has been alleged against Vermont Construction, Inc. in the original complaint that the scaffold upon which Marvin George Ellsworth Mousseau was working at the time of his alleged accident was unlawful; contrary to the requirements of the Occupational Safety and Health Act; contrary to

MILLER AND NILL
ATTORNEYS AT LAW
125 MERCHANTS ROW
RUTLAND, VERMONT

the safety requirements of other statutes, codes and regulations and the common law; and that no safety harnesses, safety lines, protective headgear, or the use of other such scaffolding safety devices were taken for the safety of the said Marvin George Ellsworth Mousseau.

6.) In the event that any or all such allegations should be established to the satisfaction of the trier of fact on the trial of the original complaint, then Johnson Industrial Painting Contractors would necessarily have breached the provisions of its contract with Vermont Construction, Inc. enumerated in Paragraphs 4(a), 4(b) and 4(d) above.

7.) Any of the alleged acts or omissions of negligence on the part of Vermont Construction, Inc. were passive acts or omissions; but the same would constitute active acts or omissions of negligence on the part of Johnson Industrial Painting Contractors in view of the work to be performed under "Exhibit C" and the obligations incurred pursuant to "Exhibit C".

WHEREFORE, by reason of the aforesaid contractual obligations, the common law, and the implied obligation of indemnity, if the third-party plaintiff, Vermont Construction, Inc. is adjudged liable to the plaintiff in the original action, as alleged, then the third-party defendant, Johnson Industrial Painting Contractors is, and ought to be adjudged, liable to Vermont Construction, Inc. in the same amount as the liability of Vermont Construction, Inc. is so determined, and Vermont Construction Inc. is, and should be adjudged to be, entitled to be indemnified by Johnson Industrial Painting Contractors from the burden of any liability adjudged against Vermont Construction, Inc. as Johnson Industrial Painting

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ATTORNEYS AT LAW
126 MERCHANTS ROW
RUTLAND, VERMONT

Contractors is ultimately responsible for the damage claimed by the plaintiff in the original action.

Third-party plaintiff demands trial by jury on all issues.

Dated this day of June, 1974.

VERMONT CONSTRUCTION, INC.

LAWRENCE MILLER

By _____
of Miller & Hill
Its Attorneys

MILLER AND HILL
ATTORNEYS AT LAW
128 MERCHANTS ROW
RUTLAND, VERMONT

37

Summons—C. A. No. 74-99.

United States District Court

FOR THE

DISTRICT OF VERMONT

CIVIL ACTION FILE NO. 74-99

ALVIN E. MARTIN

Plaintiff

v.

NEW BEDFORD CORDAGE CO., REYNOLDS & SON, INC. and VERMONT CONSTRUCTION CO.

VERMONT CONSTRUCTION CO.

Defendant and Third-Party Plaintiff

v.

JOHNSON INDUSTRIAL PAINTING CONTRACTORS

Third-Party Defendant

SUMMONS

To the above-named Third-Party Defendant:

You are hereby summoned and required to serve upon Miller & Hill, Esqs.,

[redacted]

who is attorney for the above-named defendant and third-party plaintiff, and whose address is 128 Merchants Row, Rutland, Vermont, 05701

an answer to the third-party complaint which is herewith served upon you within days after the service of this summons upon you exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the third-party complaint. There is also served upon you herewith a copy of the complaint of the plaintiff which you may but are not required to answer.

EDWARD J. TRUDELL

Clerk of the Court.

By KEITH L. SYLVESTER

Deputy Clerk.

[Seal of Court]

Dated: July 8, 1974

Brattleboro, Vermont

Note.—This summons is issued pursuant to Rule 14 of the Federal Rules of Civil Procedure.

Third-Party Complaint—C. A. No. 74-99.

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

ALVIN E. MARTIN	)	Civil Action No. 74-99
vs.	)	
NEW BEDFORD CORDAGE COMPANY, REYNOLDS & SONS, INC. and VERMONT CONSTRUCTION, INC.	)	
VERMONT CONSTRUCTION, INC. Third-Party Plaintiff	)	
vs.	)	
JOHNSON INDUSTRIAL PAINTING CONTRACTORS, Third-Party Defendant	)	

THIRD-PARTY COMPLAINT

The Plaintiff, Alvin E. Martin, has filed against the Defendant, Vermont Construction, Inc., a complaint, a copy of which is attached hereto as "Exhibit B".

Defendant, Vermont Construction, Inc. as third-party plaintiff, brings this, its third-party complaint against Johnson Industrial Painting Contractors of P. O. Box 865, Plattsburgh, New York, and alleges as follows:

1.) Johnson Industrial Painting Contractors was a New York corporation, doing business in the State of Vermont on or about September 30, 1971, the date upon which Alvin E. Martin was injured as the result of an accident as alleged in "Exhibit B".

2.) At the time of the said accident which allegedly resulted in injury to the said Alvin E. Martin, he was an employee of Johnson Industrial Painting Contractors and engaged in work for them on the Northeastern Vermont Regional Medical Center building in St. Johnsbury, Vermont.

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ATTORNEYS AT LAW
128 MERCHANTS ROW
RUTLAND, VERMONT

3.) That Johnson Industrial Painting Contractors had entered into a written contract with Vermont Construction, Inc. relating to the work being performed by Alvin E. Martin and others at the time of the alleged accident resulting in injuries to the said Alvin E. Martin. A copy of said contract is hereto attached and made a part hereof, designated as "Exhibit C".

4.) That pursuant to the terms of "Exhibit C", Johnson Industrial Painting Contractors agreed, inter alia,

(a) That all the work would be executed under the superintendence of a qualified foreman.

(b) That the general conditions, drawings and specifications specified in the contract between Vermont Construction Inc. and Northeastern Vermont Regional Hospital, Inc. formed a part of the contract between Vermont Construction, Inc. and Johnson Industrial Painting Contractors.

(c) That it would maintain insurance coverage for an amount sufficient to cover any claims for proper damages and personal injuries including death suffered by any person as a result of its operation under the contract.

(d) That it warranted to comply with all federal, state and local laws in the performance of work under "Exhibit C".

5.) It has been alleged against Vermont Construction, Inc. in the original complaint that the scaffold upon which Alvin E. Martin was working at the time of his alleged accident was unlawful; contrary to the requirements of the Occupational Safety and Health Act; contrary to the safety requirements of other statutes, codes and regulations and the common law; and that no safety harnesses, safety lines, protective headgear, or the use of other such scaffolding safety devices were taken for the safety of the said Alvin E. Martin.

MILLER AND HILL
ATTORNEYS AT LAW
189 MERCHANTS ROW
RUTLAND, VERMONT

6.) In the event that any or all such allegations should be established to the satisfaction of the trier of fact on the trial of the original complaint, then Johnson Industrial Painting Contractors would necessarily have breached the provisions of its contract with Vermont Construction, Inc. enumerated in Paragraphs 4 (a), 4 (b) and 4 (d) above.

7.) Any of the alleged acts or omissions of negligence on the part of Vermont Construction, Inc. were passive acts or omissions; but the same would constitute active acts or omissions of negligence on the part of Johnson Industrial Painting Contractors in view of the work to be performed under "Exhibit C" and the obligations incurred pursuant to "Exhibit C".

WHEREFORE, by reason of the aforesaid contractual obligations, the common law, and the implied obligation of indemnity, if the third-party plaintiff, Vermont Construction, Inc. is adjudged liable to the plaintiff in the original action, as alleged, then the third-party defendant, Johnson Industrial Painting Contractors is, and ought to be adjudged, liable to Vermont Construction, Inc. in the same amount as the liability of Vermont Construction, Inc. is so determined, and Vermont Construction, Inc. is, and should be adjudged to be, entitled to be indemnified by Johnson Industrial Painting Contractors from the burden of any liability adjudged against Vermont Construction, Inc. as Johnson Industrial Painting Contractors is ultimately responsible for the damage claimed by the plaintiff in the original action.

MILLER AND HILL
ATTORNEYS AT LAW
NO MERCHANTS ROW
RUTLAND, VERMONT

Third-Party Complaint—C. A. No. 74-99.

Third-party plaintiff demands trial by jury on all issues.

Dated this 19 day of June, 1974.

VERMONT CONSTRUCTION, INC.

By: _____
of Miller & Hill
Its Attorneys

MILLER AND HILL
ATTORNEYS AT LAW
136 MERCHANTS ROW
RUTLAND, VERMONT

Motion to Dismiss and Answer of Third-Party Defendant Johnson Industrial Painting Contractors— C. A. No. 73-240.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

DANIEL E. RYAN, Administrator of the Estate of MARVIN GEORGE ELLSWORTH MOUSSEAU	*	C.A. No. 73-240
v.	*	MOTION TO DISMISS AND ANSWER OF THIRD-PARTY DEFENDANT JOHNSON INDUSTRIAL PAINTING CONTRACTORS
NEW BEDFORD CORDAGE COMPANY, REYNOLDS & SON, INC. and VERMONT CONSTRUCTION COMPANY	*	
v.	*	
JOHNSON INDUSTRIAL PAINTING CONTRACTORS	*	

Motion to Dismiss

Third-party defendant moves to dismiss the third-party complaint for failure to state a claim upon which relief can be granted.

Answer

1. Admitted.

2. Admitted.

3. Admitted.

4. Move to strike on the grounds that "Exhibit C" speaks for itself.

5. Move to strike on the grounds that the original complaint speaks for itself.

6. Move to strike as a conclusion of law and non-traversable.

7. Move to strike as non-traversable.

8. Affirmative Defense: At all times pertinent plaintiff's decedent and third-party defendant were subject to workmen's compensation

LAW OFFICES OF
DOWNS, RACHLIN
& MARTIN
ST. JOHNSBURY, VT.

laws.

9. Affirmative Defense: Third-party plaintiff is not liable to plaintiff as alleged in the original complaint.

St. Johnsbury, Vermont. August 15, 1974.

DOWNS, RACHLIN & MARTIN

BY _____
Robert D. Rachlin
A member of the firm

CERTIFICATE OF SERVICE

The undersigned, a member of the law firm of Downs, Rachlin & Martin, certifies that on August 15, 1974, he caused within MOTION TO DISMISS AND ANSWER OF THIRD-PARTY DEFENDANT JOHNSON INDUSTRIAL PAINTING CONTRACTORS to be served upon plaintiff by mailing a copy thereof to plaintiff's attorney E. J. Tyler, III, 120 North Main Street, St. Albans, Vermont 05478; and a copy to Miller & Hill, 128 Merchants Row, Rutland, Vermont 05701, attorney for Vermont Construction Co.; and a copy to Pierson, Affolter & Amidon, 253 South Union Street, Burlington, Vermont 05401, attorney for Reynolds & Son; and a copy to Dinse, Allen & Erdmann, 186 College Street, Burlington, Vermont 05401, attorney for New Bedford Cordage Co., all postage prepaid.

_____
Robert D. Rachlin

LAW OFFICE OF
DOWNS, RACHLIN
& MARTIN
ST. JOHNSBURY, VT.
05819

Motion to Dismiss and Answer of Third-Party Defendant Johnson Industrial Painting Contractors—
C. A. No. 74-99.

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF VERMONT

ALVIN E. MARTIN	*	C.A. No. 74-99
v.	*	
NEW BEDFORD CORDAGE CO., REYNOLDS & SON, INC. and VERMONT CONSTRUCTION CO.	*	MOTION TO DISMISS and ANSWER OF THIRD-PARTY DEFENDANT JOHNSON INDUSTRIAL PAINTING CONTRACTORS
v.	*	
JOHNSON INDUSTRIAL PAINTING CONTRACTORS	*	

Motion to Dismiss

Third-party defendant moves to dismiss the third-party complaint for failure to state a claim upon which relief can be granted.

Answer

1. Admitted.

2. Admitted.

3. Admitted.

4. Move to strike on the grounds that "Exhibit C" speaks for itself.

5. Move to strike on the grounds that the original complaint speaks for itself.

6. Move to strike as a conclusion of law and non-traversable.

7. Move to strike as non-traversable.

8. Affirmative Defense: At all times pertinent plaintiff's decedent and third-party defendant were subject to workmen's compensation laws.

9. Affirmative Defense: Third-party plaintiff is not liable to plaintiff as alleged in the original complaint.

LAW OFFICE OF
DOWNS, RACHLIN
& MARTIN
ST. JOHNSBURY, VT.
05819

Motion to Dismiss and Answer of Third-Party Defendant Johnson Industrial Painting Contractors—
C. A. No. 74-99.

St. Johnsbury, Vermont. August 8, 1974.

DOWNS, RACHLIN & MARTIN

BY _____
Robert D. Rachlin
A member of the firm

CERTIFICATE OF SERVICE

The undersigned, a member of the law firm of Downs, Rachlin & Martin, certifies that on August 7, 1974 he caused within MOTION TO DISMISS AND ANSWER OF THIRD-PARTY DEFENDANT JOHNSON INDUSTRIAL PAINTING CONTRACTORS to be served upon plaintiff by mailing a copy thereof to plaintiff's attorney E. J. Tyler, III, 120 North Main Street, St. Albans, Vermont 05478; and a copy to Miller & Hill, 128 Merchants Row, Rutland, Vermont 05701 attorney for Vermont Construction Co.; and a copy to Pierson, Affolter & Amidon, 253 South Union Street, Burlington, Vermont 05401, attorney for Reynolds & Son; and a copy to Dinse, Allen & Erdmann, 186 College Street, Burlington, Vermont 05401, attorney for New Bedford Cordage Co., all postage prepaid.

_____
Robert D. Rachlin

LAW OFFICE OF
DOWNS, RACHLIN
& MARTIN
ST. JOHNSBURY, VT.
05819

Memorandum and Order— C. A. No. 74-99.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

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U.S. DISTRICT COURT
DISTRICT OF VERMONT

Alvin E. Martin

v.

New Bedford Cordage Company, Reynolds & Sons, Inc. and Vermont Construction Co.

v.

Johnson Industrial Painting Contractors

Civil Action
File No. 74-99

MEMORANDUM AND ORDER

The plaintiff in the above matter has commenced an action to recover damages for injuries sustained arising out of an accident that occurred on September 30, 1971 in St. Johnsbury, Vermont. Jurisdiction is based on diversity of citizenship. According to the allegations in the complaint, the plaintiff was working as a painter on a construction job in St. Johnsbury when the rope holding the scaffold broke, thereby causing the plaintiff to fall. The defendant New Bedford Cordage Company manufactured the rope and the defendant Reynolds & Sons sold it to the third party defendant Johnson. The defendant Vermont Construction Company was the general contractor. The plaintiff seeks recovery on theories of negligence, breach of warranty, and strict liability in tort. The plaintiff also alleged negligent noncompliance with various statutory safety requirements, including the Occupational Health and Safety Act, on the part of the defendant Vermont Construction Company.

The defendant Vermont Construction Company initiated a third party complaint against Johnson Industrial Painting Contractors, seeking indemnification for any judgment rendered

against it. Johnson was the employer of the plaintiff and was a subcontractor of Vermont Construction. The third party complaint alleges that in the contract between Vermont Construction and Johnson that Johnson would maintain insurance coverage for personal injuries sustained by any person as a result of its operation under the contract. Also, under the contract Johnson allegedly warranted that it would comply with all state, federal and local laws. This contract is incorporated as a part of the third party complaint.

The matter is presently before the Court on the motion of the third party defendant Johnson to dismiss for failure to state a claim upon which relief may be granted. The motion is supported by a memorandum of law. No reply has been submitted. The motion to dismiss is based on the premise that there can be no contribution among joint tortfeasors in Vermont unless there is some basis for indemnification.

According to Wright and Miller, Federal Practice and Procedure: Civil § 1448:

> If the governing substantive law recognizes a right of contribution, impleader under Rule 14 is a proper procedure by which to seek relief from joint tortfeasors ....
>
> In those jurisdictions that follow the common law rule and do not recognize a right of contribution between joint tortfeasors, impleader for contribution will not be allowed .... In these jurisdictions the law is said to allow the plaintiff to choose his defendants and give him the right to sue less than all of the tortfeasors against whom he might have a valid claim. If the plaintiff decides not to sue all of the tortfeasors, those that are sued cannot employ Rule 14 to seek contribution from their more fortunate fellows.
>
> But even in those jurisdictions that do not allow contribution ... a third party claim might be based on a different derivitive liability or indemnity theory.

It is well established that, absent an express or implied obligation to indemnify, the law of Vermont does not allow contribution among joint tortfeasors. Spaulding v. Oakes, 42 Vt. 343, 347 (1869); See St. Johnsbury and Lamoille County

Railway v. Canadian Pacific Railway, 341 F. Supp. 1368, 1372 (D.C.Vt. 1972). Spaulding was recently reaffirmed in Spafford v. Howard, ___ Vt. ___ (June 4, 1974), where the Court stated:

> Taking from the plaintiff his right not to sue a particular defendant could affect the strategy of his case; it could impose liability upon a person whom he does not desire to affect, for reasons of friendship, relationship, or indirect financial effect upon himself; it could also adversely affect his prospects of settlement.

There are, as previously noted, two exceptions to the rule of no contribution among joint tortfeasors. The first resides in the existence of an express agreement to indemnify; the second arises when the "circumstances attending the transaction, as between the parties, are such that the law will imply the undertaking or raise an obligation on the part of one to indemnify the other." Spaulding, supra at 347.

The third party plaintiff fails to come within either exception. There is nothing in the contract which may be construed as giving rise to an express agreement to indemnify.[1/] The fact that the third party defendant agreed to maintain insurance for personal injuries as a result of its operation under the contract certainly does not create an obligation to indemnify Vermont Construction for personal injuries caused by Vermont Construction's alleged negligence. Nor does the fact that Johnson warranted it would comply with safety laws mean that it has a contractual obligation to indemnify Vermont Construction for its alleged noncompliance with safety laws.

The third party plaintiff fails to come within the second exception. Whether or not an implied obligation to indemnify arises turns on the distinction between primary and secondary liability, - or active, as distinguished from passive negligence.

Viens v. Anthony Co., 282 F.Supp. 983 (D.C.Vt. 1968). The Court in Anthony quoted with approval from Builder's Supply Co. v. McCabe, 366 Pa. 322, 77 A.2d 368, 370 (1951), concerning the right to indemnification:

> The right to indemnity rests upon a difference between the primary and secondary liability of two persons, each of whom is made responsible by the law to an injured party. It is a right which inures to a person who, without active fault on his own part, has been compelled, by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable. The difference between primary and secondary liability is not based on the difference in degrees of negligence or on any doctrine of comparative negligence .... It depends on a difference in the character or kind of the wrongs which cause the injury and in the nature of the legal obligation owed by each of the wrongdoers .... (T)he important point to be noted in all of the cases is that secondary as distinguished from primary liability rests upon a fault that is imputed or constructive only ....

Under the doctrine of Anthony, supra at 987, the Court is called upon to examine the original complaint of the plaintiff to ascertain whether any of the allegations might be construed as alleging circumstances which would give rise to an obligation to indemnify on a theory of active, as opposed to passive negligence. The original complaint in the instant case, as it pertains to Vermont Construction, alleged that Vermont Construction's negligent failure to comply with various statutory, as well as common law, safety requirements was a proximate cause of the plaintiff's injuries. If these allegations are proven at trial, then the defendant Vermont Construction is guilty of active negligence. The contention by the defendant Vermont Construction that it was not at fault, or that it was Johnson's failure to comply with safety laws that caused the injuries complained of, rather than its own violation, are defenses that may be asserted and adjudicated at trial. If the activity of the defendant Vermont Construction concurred with that of the third party defendant Johnson, then

it is within the plaintiff's option to select those whom he seeks to hold responsible, either jointly, severally, or not at all. American Insurance Co. v. National Gypsum Co., et al, Civil Action No. 73-253 (D.C.Vt., Aug. 6, 1974); Sharon v. Anahama Realty Corp., 97 Vt. 336 (1924). The plaintiff may, in fact, have a viable cause of action against the third party defendant, but it is not within the power of this Court, under the law of Vermont, to make the plaintiff pursue such a remedy, either directly or indirectly, if he elects otherwise.[2/] In brief, there are no allegations in the original complaint to justify shifting the responsibility for the negligent acts charged against the principal defendant Vermont Construction to that party whom it seeks to hold as a third party defendant. See Prosser, The Law of Torts, (3rd ed.) § 48.

In consideration of the foregoing, it is hereby ORDERED:

That the motion of the third party defendant Johnson Industrial Painting Contractors to dismiss the third party complaint is granted.

Dated at Rutland, in the District of Vermont, this 17th day of September, 1974.

James S. Holden
Chief Judge

Footnotes

1/ The only indemnity obligation created by the contract (Article XI) is Johnson's duty to indemnify Vermont Construction for any damages incurred as the result of Johnson's defective workmanship or failure to complete the contract on time.

2/ The explanation for the failure of the plaintiff to pursue an action against Johnson may lie in the fact that the law of Vermont appears to hold an employer not liable in tort to its employee and hence cannot be treated as a joint tortfeasor. Sharp v. Osmose, Civil Action No. 6502 (D.C.Vt., Aug. 3, 1973).

Order—C. A. No. 73-240.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Daniel E. Ryan, Administrator of the Estate of Marvin George Ellsworth Mousseau v. New Bedford Cordage Company, Reynolds and Son, Inc., and Vermont Construction Company v. Johnson Industrial Painting Contractors	Civil Action File No. 73-240

ORDER

Upon consideration of the motion and memorandum of the third party defendant Johnson Industrial Painting Contractors to dismiss the third party complaint of the defendant Vermont Construction, and it further appearing that the decision of this Court in granting the motion of third party defendant Johnson in the companion case of Martin v. New Bedford Cordage Company, Civil Action No. 74-99 (D.C.Vt., Sept. 17, 1974) is controlling, it is hereby ORDERED: That the motion of the third party defendant to dismiss the third party complaint is granted.

Dated at Montpelier, in the District of Vermont, this 2nd day of October, 1974.

/s/ James S. Holden

James S. Holden
Chief Judge

Endorsed: Filed October 2 1974
Keith L. Sylvester
Deputy Clerk

Motion to Vacate Order—C. A. Nos. 74-99 and 73-240.

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

ALVIN [illegible]	)	
	)	
	)	Civil Action
vs.	)	File No. 74-99
	)	
VERMONT CONSTRUCTION COMPANY, ET AL.	)	
	)	
DANIEL RYAN, ADMR. of the Estate of Marvin Mousseau	)	Civil Action
	)	File No. 73-240
	)	
vs.	)	
	)	
VERMONT CONSTRUCTION COMPANY, ET AL.	)	

MOTION TO VACATE ORDER

NOW COMES the defendant Vermont Construction Company by and through its attorneys, Miller & Norton, and moves the court to vacate its order dismissing the third-party complaint against Johnson Industrial Painting Contractors dated September 17, 1974 filed in said cause for the reason that the order is based on the theory that Vermont Construction Company was a joint tort-feasor with Johnson Industrial Painting Contractors and that there can be no contribution among joint tort-feasors under the law of Vermont.

While the above is a true statement of the law, it is submitted that the rights of Vermont Construction Company against Johnson Industrial Painting Contractors are rights pursuant to a written contract that were attached and made a part of the third-party complaint. Pursuant to the contract, Johnson Industrial Painting Contractors agreed for a valuable consideration with Vermont Construction Company that they would:

1. Execute all of the work under the superintendence of a qualified foreman.

2. That all of the general conditions and specifications of the contract between Vermont Construction Company and Northeastern Vermont Regional Hospital, Inc. became a part of the contract

MILLER & NORTON
ATTORNEYS AT LAW
[illegible]
[illegible] VERMONT

between Vermont Construction Company and Johnson Industrial Painting Contractors.

3. That Johnson Industrial Painting Contractors undertook expressly to pay all of the damages that could be caused to Vermont Construction Company as a result of defective performance of the contract. These damages might be direct or indirect, they might result from the Law in general or from the special conditions of the contract between Vermont Construction Company and Northeastern Vermont Regional Hospital, Inc. (Article XI of Contract, attached hereto)

4. Johnson Industrial Painting Contractors agreed that all of the work in the performance of its subcontract would be in compliance with all applicable federal, state and local laws, rules and regulations thereof. (Article XVII of Contract)

The evidence introduced at the trial showed that at the time the scaffolding was erected and the men ascended it immediately prior to their fall, no foreman of Johnson Industrial Painting Contractors was present. This is an obvious breach of a specific term of the contract. (See No. 1 above)

The Manual of Accident Prevention which was referred to in the general contract also became a part of the subcontract with Johnson Industrial Painting Contractors. The evidence at the trial showed that the scaffolding was not tested in accordance with the manual nor were applicable safety harnesses and apparatus used, as specified in the manual. These are breaches of contract on the part of Johnson Industrial Painting Contractors which give rise to a cause of action in contract against it by the other party to the contract, namely Vermont Construction Company.

The language found in Article XI is broad enough to be interpreted as an express indemnity clause which requires Johnson Industrial Painting Contractors to indemnify Vermont Construction Company on account of any performance in the subcontract which gives rise either directly or indirectly, from the Law in general or from any of the special conditions of the contract between

MILLER & NORTON
ATTORNEYS AT LAW
128 MERCHANTS ROW
RUTLAND, VERMONT

Motion to Vacate Order—C. A. Nos. 74-99 and 73-240.

Vermont Construction Company and Northeastern Vermont Regional Hospital, Inc.

It is submitted that the court has inherent power to vacate its own orders while it still has jurisdiction of the matter and that justice would be served by vacating its prior order of dismissal in this instance thus permitting Vermont Construction Company to pursue its contractual remedies against Johnson Industrial Painting Contractors.

Dated this 22nd day of June, 1976.

MILLER & NORTON

By LAWRENCE MILLER
Lawrence Miller

MILLER & NORTON
ATTORNEYS AT LAW
124 MERCHANTS ROW

Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict and/or Motion for a New Trial—C. A. Nos. 74-99 and 73-240.

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

ALVIN MARTIN	)	
	)	Civil Action
	)	File No. 74-99
vs.	)	
	)	
VERMONT CONSTRUCTION COMPANY, ET AL.	)	
	)	
DANIEL RYAN, ADMR. of the Estate of Marvin Mousseau	)	
	)	Civil Action
	)	File No. 73-240
vs.	)	
	)	
VERMONT CONSTRUCTION COMPANY, ET AL.	)	

MOTION FOR A DIRECTED
VERDICT AND FOR JUDGMENT NOTWITHSTANDING
THE VERDICT AND/OR MOTION FOR A NEW TRIAL

NOW COMES the defendant Vermont Construction Company, in the above entitled cause by and through its counsel, Miller & Norton, and moves that the verdict as found by the jury and the judgment entered thereon on June 18, 1976 be set aside and judgment notwithstanding said verdict be entered for defendant Vermont Construction Company; and/or a new trial be granted in said cause for the following reasons:

1. Pursuant to Rule 50 (a) and (b) and Rule 59 (a) and (d) of the Federal Rules of Civil Procedure, the defendant moves that its Motion for Directed Verdict made at the close of the plaintiff's case, and renewed at the close of all of the evidence, be granted, and that the court direct a verdict for the defendant notwithstanding the jury verdict.

[redacted] plaintiff, an employee of a subcontractor [redacted] the plain-

(1)

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rope and materials by which the scaffold would be suspended. Further it owed no legal duty to provide a safe and suitable life line to the plaintiff. The evidence was undisputed that all of the equipment related to the scaffold and the life line were provided in fact by Johnson Industrial Painting Contractors, Inc., the immediate employer of the plaintiff, and there was no evidence whatsoever that the defendant, Vermont Construction Company, exercised any control over the selection of the equipment or the method or manner in which it was used.

3. Vermont Construction was the statutory employer of the plaintiff as defined by 21 V.S.A. §601 (3) and therefore entitled to the protection of §622 of the Act which limits the plaintiff to the rights specified under the Vermont Workmen's Compensation Act and precludes a suit against his employer founded in negligence.

4. The plaintiff assumed the risk of the circumstances directly causing his injury and is therefore barred from recovery.

5. In further support of the defendant's Motion for a New Trial, the defendant points out to the court that the jury, after some eight and one-half hours of deliberation, returned a verdict into court, which verdict found liability against New Bedford Cordage Company and Vermont Construction Company. The court refused to accept the verdict because the damages did not coincide with the court's instructions previously given. It is obvious that the jury misunderstood the court's instructions as to damages because the verdict returned against the rope company was for a lesser amount than the total damages which it attributed to the plaintiff's claim. It is the undersign's recollection that the court reinstructed the jury on damages and then told them that if they found a verdict against one defendant only they would not have the problem of damages as to the other defendant. It is submitted that the jury was tired and confused and that they had expressed their conviction in finding liability against New Bedford Cordage Company by returning the verdict into court but did not know how to award damages in accordance with the court's

s and seized upon the court's remark that if they found ne defendant only, damages would not prove a problem. s reason, it is requested that the court in its discretion, a new trial on all issues.

6. The verdict returned by the jur including the special interrogatories allocating negligence between the plaintiff and Vermont Construction Company was against the weight of the evidence and contrary to the evidence and unsupported by the evidence. The jury found that Vermont Construction Company was 65% negligent and that the plaintiff was 35%. Since there was no act which could be construed as actionable negligence on the part of Vermont Construction Company which was not also an identical act of actionable negligence on the part of the plaintiff, the evidence would not permit a finding that Vermont Construction Company was negligent to a greater degree than the plaintiff. Vermont Construction Company's only obligation was to [illegible] such acts initiated by the plaintiff. Overseeing by its very nature is secondary to the initiation of action by the party who is subject to having its actions overseen. If Vermont Construction Company failed in its duty to oversee, it failed to detect some negligence on the part of the plaintiff. The failure to oversee cannot be greater than the negligence of one who is subject to being overseen. Therefore, as a matter of law, the jury had to find 50% negligence on the part of the plaintiff.

7. Any obligations on the part of Vermont Construction Company pursuant to the general contract, were obligations that ran to the owner of the project and not to the plaintiff and such obligations imposed no legal duty, the breach of which could serve as a basis for an action in negligence against it by the plaintiff.

Dated this 22nd day of June, 1976.

MILLER & NORTON

By LAWRENCE MILLER
Lawrence Miller

Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict and/or Motion for a New Trial—C. A. Nos. 74-99 and 73-240.

CERTIFICATE OF SERVICE

I, Lawrence Miller, hereby certify that on the 22nd day of June, 1976, I served the foregoing Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict and/or Motion for a New Trial by depositing copies thereof in the United States Mail postage prepaid, to the following:

Webster & Tyler, Esqs.
120 North Main Street
St. Albans, Vermont

Dinse, Allen & Erdmann, Esqs.
186 College Street
Burlington, Vermont 05401

Pierson, Affolter & Amidon, Esqs.
253 South Union Street
Burlington, Vermont 05401

Alden T. Bryan, Esq.
192 College Street
Burlington, Vermont 05401

LAWRENCE MILLER
Lawrence Miller

MILLER & NORTON
ATTORNEYS AT LAW

60

Motion to Reduce the Amount of the Judgment Against Vermont Construction Company, Inc.— C. A. Nos. 74-99 and 73-240.

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

ALVIN B. MARTIN	)	
	)	Civil Action
	)	File No. 74-99
vs.	)	
	)	
VERMONT CONSTRUCTION COMPANY, ET AL.	)	

DANIEL E. RYAN, ADMR. of the Estate of Marvin George Mousseau	)	
	)	Civil Action
	)	File No. 73-240
vs.	)	
	)	
VERMONT CONSTRUCTION COMPANY, ET AL.	)	

MOTION TO REDUCE THE AMOUNT OF THE JUDGMENT AGAINST VERMONT CONSTRUCTION COMPANY, INC.

NOW COMES the defendant Vermont Construction Company, Inc. in the above entitled cause by and through its counsel, Miller & Norton, and moves that the judgment entered on June 18, 1976 be reduced by the amount of Workman's Compensation received by the plaintiffs from their employer, Johnson Industrial Painting Contractors, as a result of injuries received in an accident which is the basis of this lawsuit.

Vermont Construction Company, Inc. does not waive its Motions for a Judgment Notwithstanding the Verdict and/or For a New Trial or to Vacate the Order Dismissing the Third-Party claim against Johnson Industrial Painting Contractors.

Dated this 23rd day of June, 1976.

MILLER & NORTON

By Arthur Hays Butler
Arthur Hays Butler

Motion to Reduce the Amount of the Judgment Against Vermont Construction Company, Inc.— C. A. Nos. 74-99 and 73-240.

CERTIFICATE OF SERVICE

I, Arthur Hays Butler, hereby certify that on the 23rd day of June, 1976, I served the foregoing Motion to Reduce the Amount of the Judgment and Memorandum of Law in Support of Motion by depositing copies thereof in the United States Mail postage prepaid, to the following:

Webster & Tyler, Esqs.
120 North Main Street
St. Albans, Vermont

Dinse, Allen & Erdmann, Esqs.
186 College Street
Burlington, Vermont 05401

Pierson, Affolter & Amidon, Esqs.
253 South Union Street
Burlington, Vermont 05401

Alden T. Bryan, Esq.
192 College Street
Burlington, Vermont 05401

Arthur Hays Butler

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Filed Sept. 30, 1976
St. George & Vietor
Deputy Clerk

COPY

Daniel E. Ryan, Administrator of the Estate of Marvin George Ellsworth Mousseau v. New Bedford Cordage Company, Reynolds & Son, Inc., Vermont Construction Company, Inc., and George & Asmussen, Ltd. Vermont Construction Company, Inc. v. George & Asmussen, Ltd.	Civil Action File No. 73-240

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Alvin E. Martin v. New Bedford Cordage Company, Reynolds & Son, Inc., Vermont Construction Company, Inc., and George & Asmussen, Ltd. Vermont Construction Company, Inc. v. George & Asmussen, Ltd.	Civil Action File No. 74-99

MEMORANDUM AND ORDER

These companion cases arose out of an accident which occurred on a construction site in St. Johnsbury, Vermont on September 30, 1971. Marvin Mousseau and Alvin Martin, both employees of Johnson Industrial Painting Contractors, were working on a scaffold suspended on the exterior of an unfinished building when the Manila rope supporting the platform broke, causing both men to fall to the ground. As a result of the fall, Mousseau was killed and Martin was injured. Workmen's Compensation benefits were recovered from

the employer Johnson. Daniel Ryan, Mousseau's administrator, and Martin brought suit against the New Bedford Cordage Company, which manufactured the Manila rope, Reynolds & Son, Inc., the retailer from which it was purchased, and Vermont Construction Company, Inc., the general contractor on the construction project, for which Johnson was a subcontractor.

Defendant Vermont Construction brought a third party action against the employer Johnson, which was dismissed by the court on September 19, 1974. A second third party action by Vermont Construction and a claim by the plaintiffs against George & Asmussen, Ltd., a masonry subcontractor on the project, were voluntarily dismissed by these parties during the course of the trial.

After seven days of trial in these consolidated cases the jury returned special and general verdicts for the plaintiff Ryan, finding the defendant Vermont Construction liable in negligence for the wrongful death of Marvin Mousseau in the amount of $189,800 in Civ. No. 73-240. In the companion case of Alvin E. Martin against the same defendants, Civ. No. 74-99, the jury, by way of special interrogatories and a general verdict, found the defendant Vermont Construction liable in negligence in the amount of $32,500. In both cases the jury found the defendants New Bedford Cordage and Reynolds & Son not liable to the plaintiffs on their products liability claims.

At 9:25 in the evening, after approximately nine hours of deliberation, the jury reported they had reached a verdict. By answer to special interrogatories, the jury found the defendant Vermont Construction's negligence was, to the extent of 65%, a proximate cause of the accident which caused Mousseau's death. The decedent's contributory negligence was found to have been 35% of the total negligence.

Under the Vermont comparative negligence statute, 12 V.S.A. § 1036, these findings rendered Vermont Construction liable for 65% of the plaintiff's total damage which was found to be $292,000.

In the companion case of Martin, the jury found the plaintiff was guilty of contributory negligence to the extent of 35%, compared to Vermont Construction's negligence of 65%. The jury correctly applied this ratio to Martin's total damage of $50,000 and returned a general verdict of $32,500 for this plaintiff. To this extent, the general verdicts were consistent with the underlying answers to the special interrogatories and with the evidence supporting the claims against Vermont Construction.

The jury also returned general verdicts on the products liability claims of each plaintiff against New Bedford Cordage and Reynolds & Son in the amount of $25,000. The court recognized that these general verdicts were inconsistent with the court's instructions and declined to accept all verdicts, including the special interrogatories and general verdicts against Vermont Construction. Supplementary instructions were given, explaining why all the verdicts as first returned were unacceptable. The court inquired of the jury if they understood the additional instructions and the foreman answered in the affirmative. The court went on to caution the jury to inquire of the court if they had further problems and not to hesitate to request suspension of their deliberations until the next day if they were overtired. The jury gave no indication that they wished to interrupt their deliberations. Thirty minutes later the jury returned without changing the original special and general verdicts for the plaintiffs against Vermont Construction in both cases.

The plaintiffs' verdicts, as initially returned for the plaintiffs against New Bedford and Reynolds & Son, were amended to general verdicts for both defendants in each case. All verdicts were received after being confirmed on the court's verbatim reading back of each verdict to the jury. The court's invitation to a poll of the jury was declined.

After judgments were entered according to the several verdicts, the defendant Vermont Construction moved for judgment notwithstanding the verdicts, for a new trial and that the verdicts in both cases be reduced by the amount of workmen's compensation benefits paid to both plaintiffs by the carriers for their employer, Johnson Industrial Painting Contractors. This defendant also moved to vacate the court's pretrial order dismissing its third party complaint against Johnson Industrial Painting Contractors.

The plaintiffs moved for judgment against all defendants on the ground that the jury had originally returned general verdicts against all defendants albeit the damages were incorrectly assessed on the products liability claims.

The court is satisfied that the verdicts which were finally received are fully supported by the evidence and consistent with the court's instructions. There is no indication of compromise or confusion on the part of the jury in their deliberation. All of the post trial motions are denied, including the request of Vermont Construction for the court to vacate its order dismissing the third party action against Johnson.

The evidence at the trial firmly establishes that the general contractor, Vermont Construction, and the subcontractor, Johnson, were both at fault in the tragic accident that occurred on the construction site. Both actors were actively

negligent in their failure to exercise reasonable care for the safety of Mousseau and Martin. In the court's judgment, they stand as joint tortfeasors.

Again, Vermont Construction has failed to advance any express agreement on the part of the third party defendant to indemnify the general contractor, although the subcontract was prepared and submitted by Vermont Construction. To its Memorandum and Order of September 19, 1974, the court will merely add a reference to New England Telephone and Telegraph Co. v. Central Vermont Public Service Corp., 391 F.Supp. 420 (D.Vt. 1975).

Judge Oakes's opinion in that case restates the law of Vermont to the effect that one active, or primarily liable, tortfeasor may not be indemnified by another except by an express indemnification provision in a contract. Id. at 426. Compare Digregorio v. Champlain Valley Fruit Co., 127 Vt. 562 (1969). The rule against indemnification would predictably incline the Supreme Court of Vermont against reducing the injured workman's recovery by the amount of compensation he has received from his employer. The Supreme Court of Vermont has said in Dubie v. Cass-Warner Corp., 125 Vt. 476, 478 (1966):

> Receipt of statutory compensation has no relevance with respect to the employee's right to sue the tortfeasor. The wrongdoer is not entitled to credit for compensation payments from outside sources, against the damages he brought about.

See also New England Telephone, supra, 391 F.Supp. at 428.

In its present motion for judgment the defendant renews the contention advanced in its motion for a directed verdict to the effect that Vermont Construction is the statutory employer of both plaintiffs as defined in the Vermont Workmen's Compensation Law, 21 V.S.A. § 601(3):

> "Employer" includes any body of persons, corporate or unincorporated, public or private, and the legal representative of a deceased employer, and includes the owner or lessee of premises or

> other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor or for any other reason, is not the direct employer of the workmen there employed. If the employer is insured, "employer" includes his insurer so far as applicable.

As the general contractor, Vermont Construction maintains it comes within the definition, and as a statutory employer, it is entitled to immunity from common law liability by force of 21 V.S.A. § 622, which provides:

> The rights and remedies granted by the provisions of this chapter to an employee on account of a personal injury for which he is entitled to compensation under the provisions of this chapter shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise on account of such injury.

The present action is founded on the provisions of 21 V.S.A. § 624, as amended by No. 232 of the Public Acts of 1959. The 1959 amendment restored common law liability in favor of an injured employee when caused under circumstances where legal liability resides in a stranger to the contract of employment, even though the workman may have received compensation under the Workmen's Compensation Act. Herbert v. Layman, 125 Vt. 481, 483 (1966).[1/]

There is no dispute in the record that Mousseau and Martin were the employees of Johnson, an independent subcontractor of the defendant Vermont Construction. The defendant could not be held liable to the plaintiffs under the Vermont Workmen's Compensation Act in the absence of a contract of hire between the defendant and the injured workmen. Mercier v. Holmes, 119 Vt. 368, 373 (1956). To be sure, the injured employees might have resorted to Vermont Construction under the statutory definition of "employer" had their immediate employer Johnson failed to provide adequate protection, or had the defendant's subcontract with Johnson

been a scheme to evade liability under the Act. See Blake v. American Fork & Hoe Co., 99 Vt. 301, 304 (1926); cf. O'Boyle v. Parker-Young Co., 95 Vt. 58, 61-62 (1921). It affirmatively appears in the record that Johnson has undertaken and discharged its obligations to the plaintiffs under the Workmen's Compensation Law. This was in keeping with the employer's subcontract with the defendant which called upon the subcontractor to "maintain full Workmen's Compensation coverage and insurance."

The liability of Vermont Construction, the general contractor, to the employees of the subcontractor Johnson is conditional, imposed by law, in the event the subcontractor fails to secure compensation as required by 21 V.S.A. § 687.[2/] Such contingent liability does not establish the relationship of employer and employee between the workmen here involved and the defendant to shield it from liability under the exclusivity provisions of 21 V.S.A. § 622. See Sweezey v. Arc Electrical Construction Co., 295 N.Y. 306, 67 N.E.2d 369, 166 A.L.R. 809 (1946); Clark v. Monarch Engineering Co., 248 N.Y. 107, 161 N.E. 436, 438 (1928); see also Kirby v. Union Carbide Corp., 373 F.2d 590 (4th Cir. 1967); Thomas v. Farnsworth Chambers Co., 286 F.2d 270, 273 (10th Cir. 1960); 81 Am.Jur.2d Workmen's Compensation § 59.(1976).[3/] While the Supreme Court of Vermont has not specifically addressed the question, it seems quite clear that it would hold the present actions are within the legislative purpose of 21 V.S.A. § 624 - - to restore the injured workman's common law remedies against third party wrongdoers. See Dubie v. Cass-Warner Corp., supra, 125 Vt. at 479. To the extent that the exclusivity provisions of 21 V.S.A. § 622 are inconsistent with the amended provisions of § 624, the 1959 enactment must prevail. Troy

Conference Academy v. Town of Poultney, 115 Vt. 480 (1949).

The respective motions of the parties for judgment notwithstanding the jury's verdicts, to reduce the verdicts and for new trials are denied.

Since the plaintiffs Ryan and Martin and the defendant Vermont Construction stipulated in the record to voluntary dismissal of the claim in the main action and in the third party suit against George & Asmussen, Ltd., these actions are dismissed.

It is so ORDERED.

Dated at Rutland, in the District of Vermont, this 30th day of September, 1976.

James S. Holden
Chief Judge

Footnotes

1/ § 624. Dual liability; claims, settlement procedure

Where the injury for which compensation is payable under the provisions of this chapter was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies, but the injured employee or his personal representative may also proceed to enforce the liability of such third party for damages in accordance with the provisions of this section. If the injured employee or his personal representative does not commence the action within one year after the occurrence of the personal injury, then the employer or its compensation insurance carrier may, within the period of time for the commencement of actions prescribed by statute, enforce the liability of the third party in the name of the injured employee or his personal representative. Not less than thirty days before the commencement of suit by any party under this section, the party shall notify, by registered mail at their last known address, the commissioner of industrial relations, the injured employee, or in the event of his death, his known dependents, or personal representative or his known next of kin, his employer and the workmen's compensation insurance carrier. Any party in interest shall have a right to join in the suit but the direction and control of said suit shall be with the injured plaintiff.

Prior to entry of judgment, either the employer or his insurance carrier or the employee or his personal representative may settle their claims as their interest shall appear and may execute releases therefor, but the consent of the employer, or, if insured, his insurance carrier, shall be required, if the amount of the settlement by the employee or his personal representative is less than the compensation benefits which would have been payable in the future but for the provisions of this section.,

The settlement and release by the employee shall not be a bar to action by the employer or its compensation insurance carrier to proceed against the third party for any interest or claim it might have.

In the event the injured employee or his personal representative shall settle their claim for injury or death, or commence proceedings thereon against the third party before the payment of workmen's compensation, the recovery or commencement of proceedings shall not act as an election of remedies and any moneys so recovered shall be applied as herein provided.

In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or his personal representative would be entitled to recover in an action in tort. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or its workmen's compensation insurance carrier for any amounts paid or payable under this chapter to date of recovery, and the balance shall forthwith be paid to the employee or his dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payment of compensation benefits.

Expenses of recovery shall be the reasonable expenditures, including attorney fees, incurred in effecting the recovery. Attorney fees, unless otherwise agreed upon, shall be divided among the attorneys for the plaintiff as directed by the court. The expenses of recovery above mentioned shall be apportioned by the court between the parties as their interests appear at the time of the recovery.

Compensation benefits referred to in this section shall in each instance include but not be limited to all expenses incurred under sections 639 and 640 of this title.—Amended 1959, No. 232.

2/ Of course, once liability is found to exist on the part of two or more statutory employers, as defined by 21 V.S.A. § 601(3), there is no primary or secondary liability as between those "employers"; all would be primarily liable. Morrisseau v. Legac, 123 Vt. 70, 78 (1962). Such a situation frequently arises with respect to employers and their insurance carriers, since the latter are included within the statutory definition of "employer." See DeGray v. Miller Bros. Construction Co., 106 Vt. 259, 279 (1934) (insurer held primarily liable to injured employee of insured).

3/ In Thomas v. Farnsworth Chambers Co., 286 F.2d 270, 273 (10th Cir. 1960), Chief Judge Murrah's opinion dealt with a similar claim of immunity as a statutory employer advanced by a general contractor under the Oklahoma Workmen's Compensation statute; the reasoning is persuasive:

> We know of course that the basic purpose of the so called "statutory employer" provisions in the workmen's compensation acts is to vouchsafe the benefits of the act to all employees coming within their definitive provisions and to that end to prevent evasive action by all those who are engaged in a business or enterprise coming within their coverage. An equally basic purpose of the act is to make the remedies provided under the act exclusive and to insulate the employer, liable under the act, from any other liability whatsoever. Once however, this legislative objective is fully accomplished there seems no good reason for the further curtailment of the common law remedy. Indeed we see no statutory reason for not saying that the immunity from common law liability granted by the act should be coexistent with the factum of statutory liability. Of course it is within the legislative province to grant immunity from common law liability in return for vicarious statutory liability and the extent of the legislative intent is of course to be discerned from the particular language used in the enactments. But we ought not attribute to the legislature an intent to curtail the common law remedy unless such intent is manifest. And this is especially true where as here, we are but forecasters of what the state court may say about its state enactment.

A-L-V-I-N E-U-G-E-N-E M-A-R-T-I-N, having been called as a witness to testify in his own behalf was duly sworn by the plaintiff and testified on his oath as follows:

DIRECT EXAMINATION BY MR. TYLER:

Q. Mr. Martin, would you tell the jury your full name?

A. Alvin Eugene Martin.

Q. And where are you from Mr. Martin?

A. Plattsburg, New York.

Q. And how long have you lived in Plattsburg?

A. All my life.

Q. Now, Mr. Martin, you are one of the plaintiffs in this case, is that correct?

A. Yes.

Q. You have a family?

A. Yes.

Q. And is your wife here today?

A. Yes, she is sitting right there.

Q. The lady with the blond hair over here?

A. Yes.

Q. I see, you and Mrs. Martin have children?

A. Yes, sir.

Q. And how old are they now?

A. I have a boy 9 and a daughter 4.

Q. Now, referring back to 1971 Mr. Martin, were you employed at that time?

A. Yes, sir.

Q. And who is your employer?
A. Johnson INdustrial Painting.
Q. And at that time how long had you been employed by Johnson Industrial Painters?
A. Four or five years.
Q. And what did you do for them?
A. Well, we did a lot of high work.
Q. What sort of work did you do?
A. Scaffolding and ladder work.
Q. Did you also do work on the ground?
A. Yes, sir.
Q. And you painted?
A. Uh huh.
Q. This is all painting?
A. Yes.
Q. So that you were in fact, a painter, is that correct?
A. Yes, sir.
Q. And the, tell me what your position was, with the firm?
A. Just a worker.
Q. Now in 1971 and September of 1971, what job were you working on?
A. Northern Regional Medical Center.
Q. And that is located where?
A. St. Johnsbury, Vermont.
Q. And what was being done, building a hospital, is that what this amounted to?
A. Yes.

Q. Now, Johnson Painting contractors was working on that job?

A. Yes.

Q. Were they the prime contractor?

A. No.

Q. Kind of a prime contractor?

A. For painting.

Q. What?

A. Prime contractor for the painting.

Q. No, were they the general contractor on the job?

A. No.

Q. Do you know who the general prime contractor for painting was?

A. Vermont Construction Company.

Q. Was, what was the function of Johnson that they were a sub-contractor?

A. Yes.

Q. Now, what could you describe, what the outside surface of the hospital consisted of, what materials?

A. It was rough concrete and brick.

Q. And was this part of it all rough concrete and part of it all brick?

A. Yah, there were columns.

Q. There were columns?

A. (Nodded)

Q. Columns that went up and down or columns that went -

A. Columns in the floor, columns and floor deckings.

Q. Now the concrete portion of this building, - I'll waive that

question. First, what was the approximate height of the building?

A. I'd say around 48 feet.

Q. Now this concrete portion of it, at what levels did the concrete portions exist?

A. On every story.

Q. So, in other words, there were some at the bottom, some in the middle and some at the top?

A. Yes.

Q. Was some of this concrete at the very top of the building?

A. Yes.

Q. Now, what was the, what was the specific job that you were doing over there at that time in connection with the building?

A. We were there to do the outside, put a water-proof on it, [illegible] is what I called it, on the outside.

Q. Now, did this have to do with the brick or did this have to do with the concrete?

A. With the concrete.

Q. Is that a substance that you painted on?

A. Well, we put it on with a brush and sponge.

Q. And you put it on to the concrete?

A. Yes, sir.

Q. Now, what was this substance?

A. To me it looked like sand and paint mixed together.

Q. Was it in any waycaustic, was it acid, did it burn?

A. No, no.

Q. Was it -

A. You could put it on with your hand, it wouldn't burn you.

Q. Now again, after this substance was put on or how would you describe this substance,was it a smooth, -

A. No, it had a sand finish to it.

Q. Was it - did this make it abrasive kind of a rough finish?

A. Yes.

Q. Now, aside from this substance, was there any other substance being used by the Johnson people by you or the other Johnson people, on this job?

A. Well I guess they had some painters inside but I didn't see them.

Q. But as far as what you were using?

A. Nothing else.

Q. Only this substance, is that right?

A. Yes.

Q. Now, do you remember when you arrived at the job site, -

A. It was on -

Q. - that -

A. Monday morning.

Q. Monday Morning. And do you remember when that would have been? --- As far as the date is concerned? Only approximately.

MR. AFFOLTER: Excuse me, Your Honor, could we approach the Bench?

THE COURT: Yes.

AT THE BENCH OUT OF HEARING BY JURY

MR. AFFOLTER: I apologize for interrupting but I had this in mind this morning. I would request under rule 615 under Rules of Evidence, that the other witnesses for the plaintiff who are going to testify, be excused and dismissed from the court room until this witness concludes his testimony. I'd like to request that that be done with each witness except for experts.

MR. WOLFE: I don't quite understand that until this witness is - -

MR. AFFOLTER: What I mean is I'd like each witness examined outside the -

MR. BRYAN: That is the liability not the -

MR. AFFOLTER: Just the liability witnesses, not the parties.

THE COURT: Well, -

MR. TYLER: Does this include experts?

MR. AFFOLTER: No.

MR. WOLFE: Exception.

THE COURT: YOu don't include the children?

MR. AFFOLTER: I don't include the children, the parties or the experts.

MR. WOLFE: If it Please the Court, if we are going to exclude witnesses, exclude all witnesses, including the experts.

MR. TYLER: There is nothing in the rule that excepts experts.

MR. BRYAN: WAit a minute, expert witnesses often base their opinion on things that have been said in the case. I'm talking about the witness to the accident, those are the only ones we want to make sure.

MR. AFFOLTER: I think the rule has, there is nothing in here to that effect. The point is if you are going to ask to exclude our witnesses we are going to ask to exclude yours.

THE COURT: All witnesses will be excluded; experts will not be excluded. In part, the request is granted, of course the other representatives of the company -

MR. WOLFE: May I have an exception on the experts?

THE COURT: Yes

MR. WOLFE: Thank you. (AT BENCH CONFERENCE ENDED)

THE COURT: The Court will will ask counsel to notify the persons who are in the court room, the Court has been requested of one of the parties, has granted their request to exclude witnesses who are going to testify in this case, during the course of the trial. The Court will impose on the counsel the duty to see that this ruling is observed. The Court will exclude from the ruling, however, and hold that the application does not apply to experts who will be called upon to testify. Any witnesses who are in the court room who are prospective witnesses in the court room, will be asked to leave until notified by the Marshal to return.

MR. BRYAN: YourHonor I take it that does not include the representatives?

THE COURT: The Court's ruling did not apply to the corporate officers who are representing the respective defendants. They may remain seated at counsel table.

MR. BRYAN: On that score, Mr. Munson is not a corporate officer, simply the superintendent, that was, he is my representative for the client.

THE COURT: That is perfectly all right.

DIRECT EXAMINATION OF MR. MARTIN RESUMED BY MR. TYLER:

Q. Mr. Martin I think we had gotten to where when it was that you had arrived at the St. Johnsbury on this job?

A. Yes, sir, MOnday morning.

Q. And this would be in what month?

A. September.

Q. Of 1971?

A. Yes, sir.

Q. And do you remember the date?

A. It was the 26th, I think it was.

Q. It would be the month before the 30th of September, is that correct?

A. That's correct.

Q. Now, you came from Plattsburg, is that correct?

A. Yes, sir.

Q. Who else was working with you?

A. Marvin Mousseau and his brother Anthony Mousseau and my father, Harold Martin.

Q. Now did you people all come from New York State?

A. Yes, sir.

Q. And when did you go to the job site?

A. Monday morning.

Q. So you were staying in St. Johnsbury, during the week?

A. Yes, sir.

Q. Now who is the foreman for the Johnson Painting people?

A. Harold Doney.

Q. And what was his function, what did he do?

A. Well, he brought the materials and stuff to the job and seeing it got started and everything.

Q. Did he tell you where to perform your work from time to time?

A. Yes, sir.

Q. Now again referring back to September 30, 1971, could you tell us what you did that day, first, about what time did you arrive at work?

A. On Monday or Thursday?

Q. 30, on 30 September, which was Thursday?

A. We arrived on the job I'd say, a little before 7:00 and I think it was shortly after 7:00 Harold DONEY appeared and he had rope with him and we proceeded to set up the scaffold.

Q. Okay now, could you describe the type of scaffolding that was involved?

A. Aluminum "pick" with 2 braces on each side with hooks that you hook the rope block and tackle in.

Q. And you use the word "aluminum," what?

A. Pick.

Q. By "aluminum pick" what do you mean?

A. Well, it's like a ladder but it is, I think it is pretty close to 3 foot wide and it's got aluminum bead on the top of it.

Q. Is this the object that you stand on?

A. Yes, sir.

Q. To do your work? And how did you, how was this, this scaffold to be suspended?

A. Well, we had, on the ropes, we had 2, five by five's out four feet out on the roof, we had choker cables around it and we had 5 by 5"s were going out maybe ten feet and on the roof we had cement blocks on that so that nothing would move and we just hook the block and tackle in it and that is it.

Q. Okay, so in other words, there were two beams suspended from the roof, is that correct?

A. Yes.

Q. And these were weighted down?

A. Yes, sir.

Q. On top?

A. Yes, sir.

Q. And suspended well back on to the roof?

A. Right.

Q. Now, who took the material of the beams and the blocks and the boards and so forth up to the roof?

A. Marvin and I.

Q. How did you get them up to the roof?

A. Through a cubby hole or something that goes up through the roof.
Q. Now you say that I believe you said that the rope was brought to the site that day?
A. Yes, sir.
Q. And it was brought by whom?
A. Harold Doney.
Q. And he was your foreman?
A. Yes, sir.
Q. And what did he use to bring the rope?
A. Pick-up truck.
Q. Was there anything else in the pick-up truck?
A. No, I don't think so.
Q. Did, how about the pulleys, where did they come from?
A. They were in the truck too, the ropes were all together.
Q. Now, could you describe the pullies?
A. No, they looked pretty new.
Q. Now, again, describe the pulleys, how many pulleys were there?
A. There were two.
Q. Two pulleys?
A. On each section.
Q. When you say two on each section, you mean two on each end of the rig?
A. No, one on each end.
Q. Okay, how long is this bed or pick?
A. I'd say somewhere around twenty foot.

Q. Now, describe if you could, how this pulley works as one of the pulleys is attached to the bed or pick itself?

A. Yes.

Q. And how is that attached?

A. Just by a hook.

Q. All right and now let's say that would be the right side of the bed now, is there another, is there a pulley attached then to a beam up above?

A. It is hooked on the choker.

THE COURT: Try to speak up a little louder so the reporter won't have difficulty.

Q. Now by a "choker," what do you mean?

A. It is a cable.

Q. This is a cable that is tied around the beam at the top?

A. Yes, sir.

Q. So that a pulley is attached to another beam at the top and a pulley is attached down below at the, on the bed or the scaffold, one side of the scaffolding, is that right?

A. Yes.

Q. Are these pullies single pulleys or were they double pulleys?

A. Looked like they were five ropes went through them, about five times.

Q. Well is that, you, do you mean by that, there were five different wheels on each pulley or there were, - please describe how the rope went.

A. Go up one pulley then one would go down, they were like you are pulling ten pounds in picking up 50 pounds.

Q. Where would the rope start with one end of a piece of rope and describe how it would go through this arrangement.

A. Well, the rope would go up through one, go down through the pulley and back up again and back down and back up and back down, you tie on to the bottom.

Q. Okay, was it a rope attached to the top?

A. No, just passed through the pulleys.

Q. Well, was there a, what was there a hook at the end of the rope?

A. Yes.

Q. And where was that, would that loop have been attached?

A. It had to be attached to the bottom on the rung one.

Q. It would be attached to the bottom one, what do you mean by that?

A. Well, there is a like a bolt like that, it just comes down and hooks on like that.

Q. Okay now, each pulley you say, goes through each pulley twice so there are 2 wheels on each pulley, is that correct?

A. Yes.

Q. So you are saying the rope was at the bottom went up through the top pulley?

A. It went through the top of them first.

Q. After starting at the bottom where it was attached?
A. They could go either way with it.
Q. Before we get to the ropes, do I understand there was, was there a similar arrangement at the other end of the bed,, in other words, there were also two pulleys there, pulley there and attached to one of the pulleys attached to the top?
A. They were both the same.
Q. Do you have the pulleys here?
A. No, I'll buy one.
Q. So basically, this bit upon which you were to stand was suspended at both ends by a double pulley system, is that correct?
A. Yes.
Q. Now, was the pulley system arranged how? So that, how was it, how were the pulleys to be pulled up?
A. (no response)
Q. That is, how was the bed to be pulled up?
A. Just by pulling on the rope, one on each side.
Q. That would be done from where?
A. Well you can do it either on the staging or off the staging.
Q. All right, when you say off the staging, you mean from the ground?
A. Yes.
Q.. All right so let's take one of these pieces of rope from the other side that is the piece that you would be

pulling on to go up?

A. Yes.

Q. Either from the staging or from the bottom. Now, let's follow that piece of rope if you can. I realize you would rather have the pulley here, if you had a pulley to show but let's say from the bottom of the staging pulls on the one end of the rope, is that right?

A. Yes.

Q. All right now, describe where that rope he is pulling on, is going.

A. Just keeps going around the pullies and makes everything a lot easier to pull up.

Q. It goes up over the top?

A. Yes, twice.

Q. Then down the bottom pulley?

A. Twice.

Q. Twice and then it attaches?

A. Yes.

Q. Mr. Martin, I show you the Plaintiff's #1 for identification, could you tell us what building that represents?

A. Northern Regional Center Hospital.

Q. Northern Hospital, St, Johnsbury, Vermont?

A. Yes.

Q. Now is this, does this picture show the bed that you were talking about?

A. Yes.

Q. Is it aluminum bed and does it show one of the pullys?

A. Yes.
Q. And this photographs shows at the upper right a beam that appears to extend over the building?
A. Yes.
Q. Is this the outrigger or the beam that supports the scaffolding that you were talking about?
A. Yes.
Q. And there appears to be around that beam, a wire, is that the choker that you are referring to?
A. Yes.
Q. And there are also appears to be around the, suspended from that wire, a pulley, is that the way the arrangement was?
A. Yes, sir.
Q. So that the pulley was attached to the one of the pulleys was attached to the choker wire at the top, is that correct?
A. Yes.
Q. And the center of the picture near the top of the bed, another pulley shows, would this be the pulley that would be attached to the bed itself?
A. Yes, sir.
Q. Now, Mr. Martin, this photograph was this taken before or after the accident?
A. After.
Q. Now on this photograph you see the surface of the hospital building, is that correct?

A. Yes.

Q. And there's certain areas that appear to be whitish or smooth, what substance was that?

A. That was concrete.

Q. And the material in between is what?

A. Brick.

Q. And at the very top right underneath where the outrigger appears that smooth substance, is what?

A. Concrete.

Q. And was that, was that the highest point that you would have been applying the substance to the concrete?

A. Yes, also underneath.

Q. Also underneath the over-hang?

A. Right.

Q. Mr. Martin, I show you a photograph marked Plaintiff's #2 for identification, is that simply an enlargement of Plaintiff's #1?

A. Yes.

Q. And it shows exactly the same thing only in greater detail?

A. True.

Q. We'd like to offer these two photographs, I think it will help as the testimony goes in.

MR. BRYAN: No objections.

THE COURT: In order to expedite matters, the Court will ask all parties to have their proposed exhibits offered or marked before, during the recess of the Court and if there is any objection by any counsel, make that known. Otherwise it

can be marked as exhibits, but we are not going to go through each exhibit one piece at a time.

MR. TYLER: Your Honor, I didn't intend to, it is just the way this has developed. I thought it might be better to describe the physical situation with greater speed.

MR. AFFOLTER: No objections.

MR. MILLER: No objections, Your Honor.

MR. ERDMANN: New Bedford has no objections.

THE COURT: Plaintiff's #1 and #2 will be received. I'd like to look at one, then mark that so they can have one circulating with the jury so that you will all have an understanding of what they are .... You may proceed, Mr. Tyler, the jury may look at the exhibits while we are continuing with the witnesses.

BY MR. TYLER:

Q. Prior to this particular week, Mr. Doney, had you ever worked on this job before, excuse me, Mr. Martin?

A. No.

Q. So you had not been at that hospital before that?

A. True.

Q. Now this aluminum bed part of the scaffolding, is this something that - how many men does it take to lift it?

A. One.

Q. Do you have an estimate as to how much it weighs?

A. Anywhere from 80 to 100 pounds.

Q. How about the pulleys, how much do they weigh?

A. They weigh ten pounds a piece.

Q. Now, what type of containers were you using to put on your, this paint and sand substance?

A. Gallon pails. (Simultaneous voices)

Q. And how many people were to go up on this scaffolding?

A. Two.

Q. And those two people would be whom?

A. Marvin Mousseau and myself.

Q. How much did you weigh at the time?

A. About 170.

Q. How much did Mr. Mousseau weigh at the time?

A. I think pretty close together.

Q. He weighed about the same? (simultaneous voices)

A. Yes.

Q. That you did? All right now, on this scaffolding was there any sort of a retaining board or anything?

A. Back, "railing" on the back.

Q. What was the back railing made of?

A. I think it was a 2 by 4 or 2 by 6.

Q. And this ran the length of the scaffolding?

A. I believe so, yes.

Q. What was the purpose of the back rail?

A. So you won't fall backwards.

Q. Do you have an estimate as to what the weight of that back rail will be?

A. Maybe ten pounds.

Q. Now was there, when the scaffolding was put in use, was there anything else on it besides what you have

described?

A. No.

Q. Now, you say Mr. Doney brought this rope to the site, do you recall at that point, did you help to string the rope through the pulleys?

A. No.

Q. Had this been done or had it not been done when it arrived?

A. It was already done.

Q. So the rope was already through the pulleys when it got there? What type of rope was this?

A. Three-quarter inch manila.

Q. Is it, can you describe how the rope looked to you?

A. Looked brand new to me.

Q. Did you notice anything, any marks or anything on it?

A. Well, looked like ordinary rope, few dark spots in it, that's all.

Q. Is this sort of spots you have seen before?

A. Yes, sir.

Q. And what, what generally, caused these dark spots?

A. Well, grease on the pulley or something like that.

Q. Now to your knowledge, had the rope been stored on the hospital site previously?

A. No.

Q. It had not?

A. Not to my knowledge.

Q. What is a "snatch block" Mr. Martin?

A. I have no idea.

Q. Now, when the rope and the pulleys were taken out, what did you do then?

A. We used the right bumper to the truck and pulled them to straighten them out.

Q. When you drove the truck?

A. No.

Q. Well, what do you mean?

A. You just hang on to the hook, hook it with your hand and pull backward to straighten the ropes out so that one end of the pulley would be near the truck and the other would be back and you would be holding it.

Q. Did you do this with each pulley section for each end?

A. Yes, sir.

Q. Now, was the rope stretched out on the ground at that particular time, or point?

A. On the black top.

Q. Did you notice any substance on the black top?

A. No.

Q. Could you just tell us whether the black top or ground was dry or wet at that time?

A. It was dark.

Q. Now, how did you get the pulleys that were to be attached to the top up to the top?

A. We use one of our safety lines.

Q. Could you describe how you did it?

A. Well, we just me and Marvin went up on the rope and

we, my brother I guess or my father, either one, hooked, put a loop in the rope and put a hook in and we pulled them up like that.

Q. So you pulled the pulley to the top?

A. (Nodded).

Q .Then what did you do when you got the pulley to the top you attached it?

A. Yah, Marvin attached it to the choker.

Q. Now you say you started working about around 7:00 that morning, at what time did you complete rigging the pullies?

A. About 11:00 o'clock.

Q. And this was the only thing that the, you people had done during that period of time?

A. Yes, sir.

Q. Was Mr. Doney, your foreman, there during this period of time?

A. Not the whole time, no.

Q. Did the, could you tell us whether or not in the process of rigging the rope, the rope, you have an opinion whether the ropes were to rub against the building or not?

A. No.

Q. You don't have an opinion?

A. Well if you just rub against the building wouldn't bother it any way.

Q. Okay but that doesn't really answer my question. Do you know whether it was rubbing against the building or

not?

A. I imagine it did a little bit.

Q. Now did you test out this rig?

A. Yes, sir.

Q. Can you tell us how you did that?

A. Well I and "Bob" were both on the top. He went down, I stayed on the rope to watch out that nothing moved on him and my brother pulled it up four or five feet off the ground and they both jumped on it.

Q. Now, when - who jumped on it?

A. Marvin and my brother.

Q. And what were, where were you at this time?

A. On the roof, watching out that nothing moved up there.

Q. Okay.

THE COURT: We will take our morning recess at this time.

(RECESSED FROM 10:45 A.M. UNTIL 11:01 A.M.)

(Last question read aloud by the reporter)

Q. Okay, what was it that you were testing for Mr. Martin?

A. Well to make sure that nothing moved on the roof and that everything was safe.

Q. Is this method that you have described the usual method that you have used before for testing?

A. Yes, sir.

Q. Were you ever shown any different method for testing the scaffolding?

A. No.

Q. Now, did you notice anything that appeared to be out of the ordinary or not working with the scaffold?

A. No.

Q. Were you ever given any rules or shown any rules for testing the scaffolding?

A. No.

Q. Now who did you say was the prime contractor on this job?

A. For the painting?

Q. No, the prime contractor for the job?

A. Vermont Construction.

Q. During that morning, did you observe any of their representatives on the site?

A. No.

Q. Was it, was the superintendent there while you were putting up the scaffolding?

A. No.

Q. Any assistant superintendent there while you were putting up the scaffolding?

A. I didn't see any.

Q. Were you aware of any safety engineer?

A. No.

Q. Were there any safety meetings conducted on that job site?

A. I don't know.

Q. Any that were, any that you were at?

A. No.

Q. Now, you say that this scaffolding was in the process of being erected over approximately a four hour period

that morning, during that time, did anyone from Vermont Construction Company examine or inspect the rigging during that time, to your knowledge?

A. No.

Q. Did you ever see this particular rope before?

A. No.

Q. Did anyone ever point out the "OSHA" requirement to you?

A. No.

Q. Do you know, did you ever hear of "OSHA"?

A. Not until 3 months ago.

Q. Did anyone from Vermont Construction or anyone else ever show you the manual of Accident Prevention and construction?

A. No.

Q. Now after you had tested this scaffold, Mr. Martin, what happened next?

A. Oh, I went down, well, we pulled it up, I was going to tie it up but it was too hard to get on the roof.

Q. I'm sorry.

(Answer read by the reporter)

A. It was too hard to get on the roof from the roof on to the staging.

Q. So you brought the scaffolding all the way up to the roof, is that correct?

A. Yes, sir.

Q. And then you said you tied it off, you tied the scaffolding off at that point?

A. No, I tried to get on to tie it off. It was too hard to get on.

Q. So that you attempted to get on the scaffolding from the top?

A. Yes.

Q. And this was, you couldn't do this?

A. True.

Q. Okay, so what did you do next?

A. Well, we got it back to the ground and I went down and we got on the scaffold. Me and Marvin and my father and my brother, helped us pull it up.

Q. Now, what side of the scaffolding were you on?

A. The left-hand side of it.

Q. And where was Marvin Mousseau located on the scaffold?

A. To the right of me.

Q. And were you each on one side of the scaffolding or where the ropes go?

A. Yes.

Q. And these ropes come up the end of the scaffolding, is that correct?

A. Yes.

Q. And who was pulling on the rope that was pulling the scaffold up?

A. Well, on my side there was, I was pulled up and my brother was helping me from the ground.

Q. And on the other side?

A. It was Marvin and my father.

Q. So at this particualr time then the load of the scaffolding when you people and what was on it, was then suspended in effect, from two riggings, is that right?

A. Yes.

Q. Split between the two different sizes, is that correct?

A. Yes.

Q. Now, you mentioned some time something earlier about a safety line, that was what you had used to pull up the pulley. How many safety lines were there?

A. Two.

Q. And what were they attached to?

A. We have around a pipe that we have up there.

Q. Pipe up on the roof, is that what you said?

A. I think it was a pipe.

Q. And how far down did these safety lines extend?

A. I'm not positive, I think they went roughly 8 feet from the ground, something like that.

Q. Now, were there safety lines attached to you?

A. No.

Q . Why were they not attached to you?

A. Well, they wouldn't be much sense to tying it to your waist when you are on the ground.

Q. Why is that?

A. Because if you feel, you would fall to the ground any way.

Q. Now as you pulled the scaffolding upwards, could you describe how it pulled?

A. It pulls fairly easy.
Q. Now how much up did you get?
A. We got all the way to the top.
Q. Now, what portion of the building was it your intention to work on at that point?
A. Facing.
Q And that is the cement at the very top of the building?
A. Yes.
Q. And had the scaffolding come to a stop?
A. Yes, just did.
Q. And what were you doing, what were you going to do at that time?
A. Well, I held, put the rope on the other side and went to reach underneath to the, up to make a loop to tie it off.
Q. When you say to tie it off, describe what you mean?
A. Well, you put the rope on theother side and pull it, grab it from underneath and you flip it and put it over this hook, then you reach your excess and you just let go of this rope and I bring the other rope together.
Q. And this is to make the scaffolding stay put?
A. Yes, sir.
Q. And any way you say you were just in the process of doing this and what happened?
A. Marvin's side broke.
Q. And what happened to Marvin?

A. He fell to the ground.
Q. And what happened to the bed when that occurred?
A. It just swung right down.
Q. Now, what did you do?
A. I grabbed a whole bunch of ropes and hung on.
Q. Now, at that point, you were tying off the ropes at that end so you had these various ropes that were going through the pulleys to hold on to, is that correct?
A. My hands already on the side so I just grabbed one.
Q. All right and then what did you do?
A. Hung on to this for the, for a long time, maybe five to eight minutes and then they got a ladder to me and I tried to let myself down to get to the ladder and my side broke.
Q. The rope in your side broke, too?
A. Yes.
Q. And how high were you at that time?
A. I'd say around 35, 38 feet.
Q. Now, did you have any safety belt?
A. No.
Q. What is this safety belt?
A. It's the, just a big thick leather belt that goes around your waist.
Q. And what is its purpose?
A. I never used one I guess you just tie a rope on it.
Q. If you didn't have a safety belt and you were going to tie a safety rope on to yourself, how would you do it?

A. I never tied one on me.
Q. You, what use did you make of safety belts, excuse me, safety ropes?
A. Hung on to steady myself and you walk back and forth on the scaffolding.
Q. And have you ever heard of an object known as a "grab rope," shock absorbent?
A. No.
Q. You don't know what that is?
A. No.
Q. Was there any other equipment given to you other than what you have described?
A. No.
Q. Now you have worked, you had worked at that time, you say, five or six years for Johnson Paint Contractors?
A. Yes.
Q. Had you been on a fair number of scaffolds?
A. Yes.
Q. Had you, - what were these scaffolds, all rope scaffolds?
A. No, I used cable ones.
Q. And how many times would you say you used rope?
A. Well, 25 times.
Q. Did you sometimes use a fixed scaffolding?
A. Fixed, what do you mean by that?
Q. Well, I mean a flat platform from which you worked?
A. Yes.
Q. Do you do this frequently?

A. Oh, on some jobs you have to have it.

Q. Now, tell me, did you ever take any courses or any courses ever given to you, any courses you ever took on scaffolding?

A. No.

Q. Were you shown any reading or regulations on scaffolding?

A. No.

Q. Do you have other than, could you tell us what knowledge you have had of rope?

A. Well, it is pretty hard to say.

Q. Is your knowledge just having seen the rope on these various jobs?

A. I have worked with it, yes.

Q. Now you say that cable is sometimes used for scaffolding?

A. It's possible.

Q. Why was it not used here?

A. Well it, the way the building was.

Q. Did you try to use it here?

A. Yes , sir.

Q. And when did you do that?

A. I had a day before.

Q. And how, who brought that cable?

A. Harold Doney, I think did.

Q. And can you tell us why that cable scaffolding didn't work?

A. Well first the thing we couldn't get high enough because of the hooks that were in the ceiling on the roof and we got close to the top it tipped on too much

of a slant, we couldn't reach what we had to do any way.

Q. And why would rope have been any different, why was the rope different so that you would be able to do this?

A. Well, we could get ourself up to where we had to work.

Q. Why was that? Why couldn't you have done the same thing with the cable?

A. Because we couldn't hook the hooks out, hooks had to be in the roof.

Q. If the hooks were in the roof, what effect would that have had on this, why would that make the scaffolding tilt so that you couldn't get up to the top?

A. Cables were right in close to the roof, you would have to have wheels out to the front of the staging, so that it would go up on the side of the building.

Q. Now you say that aside from this paint and sand that you used, there was no other caustic or substance used by you or the Johnson people, was there any that you observed used by anyone else on that particular job site that week?

A. Yes, sir.

Q. And when didyou make this observation?

A. I think it was the second day we were there on Tuesday.

Q. And who did you see doing this?

A. Well, I have seen this one fellow on jobs before and it's all I know by his hair, he is a plasterer.

Q. He is a plasterer?

A. Yes, sir.
Q. Do you know by whom you have knowledge, by whom he was employed at the time?
A. No.
Q. Now, could you tell us what it was you observed on and on what day, if you remember, it was that you observed it?
A. Well, like I said, I think it was on a Tuesday and we were washing brick. They had big black gloves on and they had black hard rubber panels I guess and stuff smelled wicked.
Q. And what was it that they were, what was it they were doing with this stuff?
A. Well, they were using brushes, some kind of a brush I don't know if it was steel or what it was.
Q. For what purpose?
A. Cleaning the white stuff off the brick.
Q. And did they, after they used the steel brushes on it, what did they do?
A. they washed down the stuff with water hose.
Q. Now, did, do you know whether the other people with you observed this?
A. I don't believe they did.
Q. During those days before you rigged the scaffold, were you all working all the time, at the same time on the same spot?
A. Well no, my brothers were working inside, my brother

and my father were working inside one or the other that day, I don't know where I was but the rest of the time we were all working outside.

Q. Now Mr. Martin, you say you fell some 30 odd feet to the ground, can you describe what happened to you?

A. Well, I was falling on my feet, I thought I was doing all right then the staging took me underneath the arm and flipped me over and I landed in a crouched position on the side of my head.

Q. Were you able to get up?

A. Well I got up then I kind of went sideways and fell down again, somebody hollered for,to hold me down so they held me down.

Q. Were you conscious of any particular injury at that time?

A. No.

Q. And were you taken to the hospital?

A. Yes.

Q. Were you examined by a doctor?

A. Yes.

Q. Did, - were you requested to stay over at the hospital?

A. Yes.

Q. Did you stay?

A. No.

Q. Why didn't you stay?

A. I just wanted to get out of there.

Q. Now, did you go back to the site?

A. Yes.

Q. And what was your purpose of going back to the site?

A. Go home, I guess.

Q. Where your vehicle was?

A. It was Marvin's car.

Q. Do you remember the name of the hospital you were taken to?

A. Bright Hill.

Q. Mr. Martin, I show you some photographs marked Plaintiff's #3 through #7 for identification and I will ask you what those photographs represent?

A. That's the hospital.

Q. At what time?

A. Approximately a little after 11:30 the day of September, 1971.

Q. In other words, after the accident had occurred?

A. Yes, sir.

Q. Was this the way things looked as you recollect them after you came back from the hospital?

A. Yes, and the work we were working on.

Q. These were all pictures of the accident site, is that correct?

A. Yes, sir.

Q. And of the scaffolding and the ropes?

A. Yes.

Q. As they were after the accident occurred?

A. Yes, sir.

Q. Showing you Plaintiff's #6, there appears to be something that looks that, in the right-hand side of the

photograph that looks round and somewhat squashed down, what is that?

A. That is the gallon pail we used.

Q. And that's one of the one-gallon pails that had pre-coat in it?

A. Yes.

Q. And this is all in the same area where the rope had fallen?

A. Yes, sir.

Q. I'd like to offer these.

MR. BRYAN: No objections.

MR. MILLER: No objections.

MR. AFFOLTER: No objections, Your Honor.

MR. ERDMANN: No objections.

THE COURT: Plaintiff's #3 through #7 are received and may be marked as exhibits.

MR. TYLER: May I show these to the jury, Your Honor?

THE COURT: Yes.

(Photographs handed to the jury)

THE COURT: You may continue, Mr. Tyler.

Q. Would you come over here just a minute, Mr. Martin?

A. (Leaving the witness stand)

Q. Now I show you various rope, I show you various rope here marked as rope, this will be Plaintiff's #14, Plaintiff's #15 through #16, #17, #18 and #19 and I ask you if that looks to you like the rope that was used

in your accident?

A. Yes, it does.

Q. And does it, do you notice any particular differences?

A. Well, ..

Q. Differences in it than as you recollect it at the time of the accident?

A. Well, it is a little bit dirtier than it was.

Q. Okay, I see, on Plaintiff's #15 for identification some red substance and in a portion of the rope, do you recollect having seen that substance?

A. No.

Q. I also see some similar red substance on a couple of the other sections of the rope, do you recollect having seen that substance?

A. No.

Q. Now this rope I take it, was not at the time that you saw it in various pieces and chopped up as it is here, is that correct?

A. No, it wasn't.

Q. You may resume your seat.

A. (Returned to the witness chair)

MR. TYLER: Your Honor, by agreement of the parties this is the rope that was at the accident site and was the subject matter of this action and with that in mind, I would like to offer it at this time.

MR. BRyAN: Your Honor, Mr. Tyler says it is an agreement. We agree that it is the rope. We have no way of

knowing it is the rope. We assume Mr. Tyler has told us all the facts that he knows it was the rope and we don't contest that as far as we can say, we just don't know. We assume he is right and he has the right rope.

MR. TYLER: My understanding of counsel at Chambers yesterday we agreed this was the same rope which would eliminate a chain of custody and so forth.

MR. BRYAN: We are not going to worry about chain of custody, Mr. Tyler has done all he can to figure out it is the same counsel, we have no proof to the contrary.

MR. AFFOLTER: I think we agree, the only objection we have it is, if it is introduced, that the witness testified that it is in different condition than it was at the time of the accident. That being the case I think it has to be shown why it is in a different condition.

THE COURT: Well the testimony is that it is dirtier than it was as he recollected it.

MR. AFFOLTER: I'd like to inquire of the witness if that is the only difference.

THE COURT: Well, we'll allow you to inquire at this time before the Court rules on the offer. You may inquire now. So we can take this in order, Mr. Erdmann, on behalf of New Bedford, do you have any questions about it, if you do, you may ask them.

EXAMINATION BY MR. ERDMANN:

Q. You say that the rope is marked as Plaintiff's Exhibit #15, #14, through #19, that is the batch of rope here,

but a little, - looks a little dirtier, do you know, as you recall it at the job?

A. Yes.

Q. You will agree with me now though, that your memory now was not, not as good as it was at the job, is that right?

A. Yes.

Q. Yah, it's five years later now?

A. Yes, sir.

Q. And when this accident happened?

A. (Nodded)

Q . And isn't it quite probably that the rope that is shown in the photographs and the rope that you see here is about the same color? I'd ask you to look at the photographs, too. Here, take a look at Plaintiff's #6 that shows a lot of dirty rope on the ground, doesn't it?

A. Well, it still looks a little bit dirtier than it was.

Q. Will you agree with me Plaintiff's #6 shows three-quarter inch rope that is quite dirty lying on the ground and that various helter, skelter fashion?

A. I didn't look at the rope after the rope went on the ground, I didn't go that close to the site after.

Q. Plaintiff's #6 has been offered into evidence over no objections and you yourself testified those photographs show the scene as you recall it and you got back from the Bright Look Hospital, would you agree with me

By Erdmann:

Plaintiff's #6 shows a mass of dirty three-quarter inch rope on the ground.

MR. WOLFE: I object to the characterization of the defense counsel here, Your Honor. He could ask what the photographs show but he is characterizing what it shows.

THE COURT: The photograph speaks for itself, we will allow the inquiry. Go ahead.

A. What was the question?

Q. (Last question read aloud by the reporter)

A. Yes, sir.

Q. And would you agree with me that Photograph #6, the condition of that rope looks substantially the same as this rope looks today, that is, Plaintiff's #14 thru #19?

A. Well, looking at this picture this looks a lot dirtier than that rope.

Q. The rope in the photographs looks dirtier than this rope to you?

A. Well, could be the light.

Q. Okay, that is all we have.

EXAMINATION BY MR. AFFOLTER:

Q. Mr. Martin, I just want to understand you correctly, are you testifying today the only change in the rope between the time of the accident and now is as to your observation which is the dirtiness or cleanliness of the rope?

By Affolter:

A. No, it is all broke up in pieces, too.

Q. So it definitely isn't in the same condition as it was at the time of the accident?

A. (No response)

Q. Is that fair to say?

A. Well, it is not.

Q. Something caused it to break up in pieces?

A. Oh, yes.

Q. Is it fair to say the rope is not in the same condition as it was at the time of the accident for at least two reasons, number one, it is dirtier, number 2, it is broken up into pieces?

A. Well, there's not that much of the change they had this broke up and just a little bit dirtier.

Q. Broken up and dirtier, otherwise it is the same, is that right?

A. Yes.

Q. Have you seen the, do you remember five different colors of paint on this rope?

A. No.

Q. Did you observe that?

A. No.

Q. You haven't seen that at any time?

A. Just at that pinkish stuff on it.

Q. Just the pinkish color is that all you know?

A. (Nodded)

By Affolter:

Q. Do you know what that is?

A. No.

Q. Was that on at the time of the accident?

A. I didn't see it.

Q. Was it on?

A. I don't know.

Q. You didn't look the rope over after the accident?

A. No.

Q. You didn't look it over extremely carefully after the, or before the accident?

A. No but as I said it was new rope.

Q. Didn't have any pinkish stuff on it before the accident?

A. I didn't look at it that close.

Q. You know, or you don't know whether it might have had four or five different colors of paint on it before the accident?

A. Not to my knowledge.

Q . But you didn't look it over closely enough to know for sure?

A. no.

MR. AFFOLTER: Thank you.

MR. MILLER: We have no further questions at this time.

MR. BRYAN: We have no questions.

THE COURT: Plaintiff's #14 through #19 will be received.

DIRECT EXAMINATION RESUMED BY MR. TYLER:

Q. Now, Mr. Martin, you say that you went to the hospital and back to the site and then where did you go after that?

A. Went back to Plattsburg.

Q. Did, at this point, were you conscious of having any problems as a result of your fall?

A. Yes.

Q. Could you describe those problems?

A. I had pains in my leg and my lower back and my arms.

Q. How did you attribute the pain in your arm?

A. Well, when I fell I hit the staging on the way down.

Q. Was there any mark or anything on your arm?

A. Yes, there was abrasions on underneath it.

Q. And describe when you first were conscious of any problems with your neck?

A. I was laid in the hospital.

Q. And what could you say more, could you tell us what those problems were?

A. Well, my neck started getting stiff and I didn't even notice I hurt my arm so I raised my arm up to rub my head, the nurse saw it was numb.

Q. Was any device to- given to you at the hospital, any medical device for your neck?

A. Oh, a collar.

Q. And how would you describe that collar?

A. Well, it's like a big horse collar, goes on your neck.

Q. I see, now, did you seek medical attention when you got to Plattsburg?
A. No, not that day.
Q. Did you, subsequently?
A. The next morning.
Q. And where did you go?
A. I went, I don't know, I don't remember if I went to the hospital or the doctor's office.
Q. And who was that doctor?
A. Donald Kasperzak.
Q. Now were any x-rays taken?
A. Yes at both hospitals.
Q. X-rays were also taken in the, at the St. Johnsbury Hospital?
A. Yes, sir.
Q. And x-rays were taken of what at the hospital in Plattsburg?
A. Neck and head.
Q. Okay, as a result of Dr. Kasperzak's examination of you, was there anything else done besides x-rays?
A. I went to physical therapy.
Q. Could you describe what type of physical therapy?
A. I laid on a flat table and they put like a football helmet around your chin and back of your head and there's a machine that stretches you.
Q. How, how many times a week did you do this?
A. It was 2 or 3 times a week.

Q. And for how long a period of time?

A. I believe it was about six to nine weeks.

Q. And was there any other type of physical therapy besides what you have just described?

A. No, not, none, other than my wife rubbing my back.

Q. Did you take any medication during this period of time?

A. Yes.

Q. Was medicine prescribed by a doctor?

A. Yes.

Q. For how long did you take prescription medication?

A. Just took them until I -

Q. Do you know how long that was?

A. I took them pretty much, didn't help me, they made me so groggy I didn't want any more.

Q. Do you know what the purpose of the pills was?

A. Pain pills and I don't know what the other ones were.

Q. All right, how long did you continue to have to wear the collar?

A. I don't know, about three months, I guess.

Q. How much during the day did you wear the collar?

A. I had to wear it pretty much, you didn't take it off very much.

Q. Why was that?

A. If you took it off you tried to bring your neck around and it wouldn't work.

Q. Did you take it off when you went to sleep?

A. No, I tried to have that once, it really hurt, if you

try to sleep.

Q. Now, how long had the problems with your neck continued to - you have no more problems with it?

A. No, still bothered with it.

Q. And how frequently are you bothered with it, would you describe what the symptoms are?

A. Well, it just catches about 2 or 3 times a week when you turn, just right, or feels like ants crawling in the back of your neck.

Q. What do you do about it?

A. Nothing you can do.

Q. All right, how about, will you describe your arm, did you have any further problems with that? What problems did you have with your arm?

A. I didn't have too much problem, just got a little weak once in a while, that's all.

Q. Did you say you had problems with your leg?

A. No.

Q. Any problems with your, you said they had x-rays taken, Mr. Martin?

A. Yes.

Q. Do you have any problems with your head?

A. Just headaches.

Q. Had you had headaches before?

A. Not in that as many as I had.

Q. And would you describe these headaches?

A. Just bad ones.

Q. How frequently?
A. Just about every day.
Q. For how long a time did those last?
A. Well until it, it lasts a couple of hours.
Q. And for how many, for how long a period of time did you continue to have these bouts of headaches?
A. I've still got them.
Q. How frequently do you have them?
A. Pretty hard to say.
Q. Are they the same or are they the same or different from the headaches that you had immediately after the accident?
A. Possibly I'd say I do they change right around your eyes.
Q. Had you had this sort of headache before the accident?
A. No.
Q. You have, has there, is there any length of time or period of time you have gone without the headaches?
A. No.
Q. Now, how long was it, Mr. Martin, before you were again employed?
A. I don't know about eight months, I guess, seven.
Q. And for whom did you go back to work for, Mr. Johnson?
A. Yes.
Q. What was the nature of your work that you went back to?
A. I, we had to do wheelbarrow work.
Q. And was there any high work in this job?

A. Not usually, I mean just had one stairwell that was up above 24, 25 feet, I guess.

Q. Were you supposed to do that stairwell?

A. Well the foreman asked me to go up and cut the ceiling and I said I wasn't going to do it.

Q. Why was that?

A. Because I won't, I couldn't climb any more, I could not climb any more.

Q. When you say you couldn't climb any more, how do you know you couldn't climb any more?

A. Well, I tried it.

Q. Where did you try it?

A. I didn't actually try to climbing, I just went deer hunting and I climbed up a mountain and I scared myself and turned around.

Q. This had, this ever happened to you before?

A. No.

Q. Had you tried doing any work around your house that involved any height?

A. Yes, I was going to put on a roof on it, I had to pay somebody to put a roof on it.

Q. Why was that?

A. I had a bead of sweat get on me.

Q. How high was this roof?

A. A little over 20 feet, I guess.

Q. Now, since that time, have you attempted to work at heights?

A. I tried it on a couple of different occasions.
Q. Are you able to get up to a certain height?
A. Well, I went to a doctor and tried to, you know, find out and he said, well, just -
MR. ERDMANN: Object.
THE COURT: Yes, we will sustain the objection.
Q. As the result of any medical advice that you had, did you make any attempt to try to climb?
MR. ERDMANN: We object to the form of that question, Your Honor, it's an obvious way to get in testimony from some witness not in this court room.
THE COURT: We will allow the witness to answer if he received medical advice regarding this subject.
A. Yes, I have.
Q. And I guess, I'm sorry, I forgot my original question.
(Question read aloud by the court reporter)
Q. And your answer to that is what?
A. Yes, I did,
Q. And what could you describe the attempts that you made?
A. Well, my doctor told me that -
Q. You can't, - excuse me, you can't say what your doctor told you, just tell us what you did.
A. Well, I tried to go up one day for another occasion and I got up there and I got an inch aways and I can't do anything, just hang on and beads of sweat come on me.
Q. How high can you get before this happens?

A. Well now I go about 25 feet.
Q. You have found that you have been able to increase over the years?
A. Yes.
Q. Well, -
THE COURT: We will recess at this time until 1:30.
(RECESSED FOR LUNCHEON AT 12:00 NOON UNTIL 1:35 P.M.)
THE COURT: We are going to have to turn off the air conditioner while the witness is testifying. Mr. Tyler you may proceed.
By Mr. Tyler:
Q. Mr. Martin, you have described how you had gone back to work some, I believe six or seven months after the accident, for Mr. Johnson and this stairwell incident you have indicated you could not climb the stairwell. How much longer after that did you work for Johnson?
A. Two days.
Q. What happened at the end of two days?
A. I got laid off.
Q. Now, do you recollect what your income was from the years 1968, subsequently?
A. Close to $7,000.00.
Q. Would your 1968 income tax return help to refresh your recollection in your income for that year?
A. 6868.
Q. That was your gross income for 1968?

A. Yes, sir.
Q. And were you employed by whom in 1967?
A. Johnson INdustrial.
Q. And could you tell us what your income was for 1969?
A. $7,100.00.
Q. $7,000.00 what?
A. $100.
Q. And again you were employed for -
A. Johnson Industrial Painting.
Q. Do you remember your income for 1970 or - 1970?
A. The year 1970? $7,400.00.
Q. And again you were employed that year by whom?
A. Johnson Industrial Painting.
Q. In 1971 was the year of the accident, do you recollect what your income was that year?
A. (No response)
Q. Your income was what during that, the, during the part of the year that you worked in 1971?
A. $5,400.00
Q. And of course, you testified you were unable to work after September 30th that year?
A. Yes.
Q. And now in the previous years therefore, your income each year for St., excuse me, for Johnson Industrial had gone up approximately $300.00 a year?
A. Yes.
Q. And why was that increased?

A. Raises.

Q. This work that you did for Johnson Industrial was it strictly outside work?

A. No.

Q. You did indoor painting, too?

A. Yes.

Q. And this was during the winter?

A. Yes.

Q. So you worked a fair amount during the winter months for them?

A. Yes.

Q. Now, after your 2 day, 3 days in early 1972 or May, I think you said of 1972, when you first went back to Saint, - went back for Johnson Industrial to Johnson Industrial, you did, did you look around for other work?

A. Before I went back?

Q. After you went back? And after you were laid off?

A. Yes, sir.

Q. And were you able to find other work?

A. Yes, sir.

Q. And what other work were you able to find?

A. Black top paving.

Q. Did this work require working at any heights?

A. No.

Q. And who was the employer that you were employed by in that respect?

A. Rollin Carr Black Top Paving.

Q. Now, do you know what your income was for 1972?

A. $4800.00.

Q. And this was for that company?

A. Yes, sir.

Q. Or practically all for that company?

A. Yes.

Q. Do you know what your income was for 1973?

A. I think it was $5200.00.

Q. Well, would your income tax return help to refresh your recollection?

A. $5300.00.

Q. Now, do you know what your income was, your approximate income was for 1974?

A. I think it was $5400.00.

Q. And during those years were you also employed by the black top company?

A. Yes, sir.

Q. And in 1975 were you also employed by that firm?

A. Yes.

Q. And what was your income in 1975?

A. $5500.00.

Q. Now did you take on all the work that you could for that company?

A. Yes.

Q. Is that seasonal work?

A. Yes.

Q. In what way is it seasonal?

A. You can only work the summer months.

Q. Does weather have anything to do with it?

A. Yes.

Q. And in what way?

A. The, - you can't lay black top when it rains.

Q. Now was there any, were there any other jobs that you were able to find during this period of time?

A. No.

Q. What was the extent of your education in school?

A. Tenth grade.

Q. Now by whom are you employed at the present time?

A. Johnson Industrial Painting.

Q. When were you able to get a job back with Johnson Industrial Painting?

A. 3 months ago.

Q. And are you required to go up in heights on that job?

A. No.

Q. So is that an understanding that you have?

A. Yes.

Q. And today have they been able to give you work that does not involve going up on heights?

A. Yes.

Q. Have they assured you that they will continue to give you such work?

A. Oh, to keep, if the jobs keep up, yes.

MR. TYLER: No further questions, Your Honor.

CROSS EXAMINATION BY MR. ERDMANN:

Q. Mr. Martin, approximately how many years had you worked as a painter on high scaffolding?

A. Just about ever since I started.

Q. Five or so years?

A. Yes, sir.

Q. Did you have any experience with scaffold painting before five years with Johnson?

A. No.

Q. Would you say that approximately 50 percent of your work experience was on high scaffolding and the other 50 percent on the ground?

A. Yes.

Q. Would it be fair to say you knew how to rig a scaffolding?

A. At the time of the accident?

Q. Yah.

A. Yes, sir.

Q. Yah, in other words, you knew if somebody said, "Alvin, rig up the scaffolding today," you could do that without anyone instructing you as to how to do it, couldn't you?

A. Today? Not today.

Q. Back in 1971?

A. Yes, yes.

Q. Yah, there was no tricky aspects of it that you needed to have explained to you, was there?

A. ON some buildings I asked somebody older than me, yes.

Q. I'm talking about rigging the scaffolding, running the ropes through the pulleys and hooking them on to the scaffolding, you knew how to do that?

A. Yes.

Q. Sure, you knew all about the use of safety ropes?

A. As much as I have seen, yes.

Q. Well, you knew what a safety rope is for, don't you?

A. Yes.

Q. You know that if you fall from a height of 20 feet, you could very well hurt yourself and seriously?

A. True,

Q. Yah, you went up on that scaffolding without your safety rope upon you, you well knew if you fell from that height, you would be seriously injured, isn't that true?

A. We had on safety lines but didn't get a chance to put our hands on them.

Q. What I mean is, you knew without being attached to your safety lines, as you progressed up the building to say a height of 20 feet up or so, if you had fallen from that height you would have seriously injured yourself, you knew that, didn't you?

A. Well, I'm not - -

MR. TYLER: I object, it is a double question here and I don't know which one he wishes the witness to answer.

THE COURT: We will allow the witness to answer.

Q. Go ahead.

A. Well if you are pulling yourself up you are using both of your hands and you haven't got a chance to tie yourself off unless you stop the staging in the middle and tie it to you, you go up 2 or 3 feet then you untie the rope and tie it again as you go up 2 or 3 feet.

Q. You knew if you were up 20 feet high without the safety rope attached to you and you fell you would hurt yourself, didn't you?

A. Yes.

Q. But you felt that it was inconvenient to tie the safety rope on every few feet, isn't that true?

A. I never did it before.

Q. But yet you well knew if you didn't do it, if you didn't tie it and you fell, you would get seriously hurt?

A. Yes.

Q. Yah. Now, concerning the, your arrival at the hospital on Monday September 26, 1971, apparently you brought with you a steel cable scaffolding?

A. No, I think Harold DONEY brought it.

Q. Mr. DONEY brought it with him that Monday, is that true?

A. I'm not positive.

Q. Well, you had the steel scaffolding there and tried to use it?

A. The cables?

Q. You had the steel cables?

A. Yes.

Q. Why use the steel cable? Why use, why was the, why was it necessary to use steel cables?

A. I don't know.

Q. You have no idea?

A. Harold Doney suggested it.

Q. Why, don't you have any idea why?

A. No, I don't.

Q. You didn't, you don't know that steel cables in the presence of corrosive substances are far safer to use than manila rope?

A. I didn't think there were any corrosive substances there.

Q. There came a time though, when you _____ out there because corrosive substances were there, didn't you?

A. Yes.

Q. And yet thereafter you chose to use the manila hemp for the scaffold support isn't that true?

A. We didn't choose, we didn't have much of a choice,

Q. Well, you knew that it was not a good idea to use the manila rope in the presence of corrosive substances, right?

A. I never run across it before.

Q. You knew, didn't you, sir, that it was not a safe procedure to use the manila rope in the presence of corrosive substances and that was why Mr. Doney chose to use the steel cables first, isn't that true?

A. Okay, yes.

Q. Yah, but apparently you didn't like, for some reason, the steel cables didn't work, so you then chose to use the manila rope in the presence of the corrosive substances, isn't that true?

A. Yes.

Q. And you knew at the time you rigged that scaffolding up that the corrosive substances were around, you saw these workmen splash what you said was wicked smelling stuff and they were using rubber gloves, isn't that true?

A. Yes.

Q. Why did you not use the steel cables?

A. Because we didn't hook them up.

Q. All right, the steel cable at the top pulley just had some kind of a hook that would normally hook into a roof, didn't it?

A. Yes.

Q. Why not simply hook that steel cable arrangement to the beam that supported the pulley at the top of the roof that was used for the manila rope?

A. Too hard to hook up.

Q. Why shot slip the steel hook right through where the pulley was hooked on to?

A. That hook is 3 foot high, still couldn't get you high enough.

Q. You got a smaller hook, couldn't you get hooks of any size, - you can, can't you?

A. I don't know, better ask the foreman that.

Q. Well now, you have been to hardware stores, haven't you?
A. Not that much.
Q. You have been to hardware stores, haven't you?
A. Yes, I was in one this morning.
Q. And you receive various types of hooks that are used on chains and ropes, haven't you?
A. Yes.
Q. And there are hooks attached to these pulleys are there not, in some instances?
A. Yes.
Q. And these hooks are easily purchased in most any hardware store, aren't they?
A. Yah.
Q. Sure. And if it was a matter of just using a steel hook you could have bought simply any size hooks you wanted to and used that steel rigging, couldn't you?
A. You could, yes.
Q. Yah. You mentioned to us that when you first saw this rope the manila rope, that you could see black spots on the ropes, couldn't you?
A. Well yes, I have seen a lot of ropes with black spots on them.
Q. In fact, you saw this rope with black spots on it, didn't you?
A. Well, I just - it just looked like spots.
Q. You saw the rope with black spots on it, didn't you, sir?
A. Yes.

Q. Yah. May we have plaintiff's photographs exhibits? (Handed to counsel). Thank you. These aren't your, these are - (mumbling to other counsel, incoherent).

MR. ERDMANN: Your Honor, I have Plaintiff's Exhibits #1 through #7 marked and admitted is that true?

THE COURT: Yes.

THE CLERK: they haven't been marked on there.

MR ERDMANN: All right, so that we don't get confused let's mark the exhibits that have been admitted.

Q. Now Mr. Mousseau, Mr. Martin, I want to show you a blow-up marked Plaintiff's #2 for identification or Exhibit #2 which is also identical with Plaintiff's #1, #2 being just a blow-up, can you turn #1 over and see that they are the same?

A. (Doing so)

Q. Are they not?

A. Yes.

Q. Now, with Mr. Vesper's pen here, let's see a pink will mark on there? Yah, pink will. Would you agree with me that on Plaintiff's #1 you have a black mark right where I am pointing?

A. Yes.

Q. All right and we've got a circle around the black mark, right?

A. (Nodded).

Q. Then the next point there is a black mark where I am

pointing now?

A. Yes.

Q. All right, okay and right there?

A. Yes.

Q. And up here there's another black mark of some sort, see it?

A. Yes.

Q. All right and right up there there's a very dark mark, isn't that true?

A. Yes.

Q. Okay now, I'll write on here if you agree, pink circled mark, black marks on the rope, all right?

A. (No response).

Q. Do you agree with that?

A. Yes.

Q. All right. (Writing on photograph). Okay now, we have put pink circles or black marks now on just that exhibit, #1, those pink marks are clearly visible even up to the almost the top of that building which must be at least 48 feet away, isn't that true?

A. Yes sir.

Q. And that rope is not any wider than 3 quarters of an inch is it, it is a very narrow, well, comparatively speaking, it is three quarters of an inch about 48 feet away, isn't it?

A. Yes.

Q. And so to a painter such as you are, handling all these

lines, rigging that scaffolding, those marks must have been clearly visible, isn't that true?

A. They could have been in pulleys.

Q . Sir?

A. They could have been in pulleys they could have been wrapped in the pulleys.

Q . They were clearly visible when you were rigging the scaffolding weren't they, you, yourself said that when you pulled out the ropes was the first time I saw the black marks, is that true?

A. When did I say that?

Q. This morning, I thought.

THE COURT: Well, the question is argumentative Mr. Erdmann.

Q. Well, when you first saw the rope in the morning, you saw those black marks on it, didn't you?

A. On Thursday morning?

Q . The first time you saw that rope you saw the black marks on it, didn't you?

A. Well, it was like any other rope.

Q. The first time you saw the rope it had those black marks on it, didn't it?

A. If it did, I didn't notice them that much.

Q. Well sir, your testimony is that this rope came from Mr. Doney was immediately put into a scaffold and that scaffold went up the building once, then came down once and broke, then you got on it and it broke, isn't that

true?

A. Yes, sir.

Q. So this rope, according to your testimony, was not used except that very first time on this job?

A. True.

Q. Isn't that true?

A. Yes, sir.

Q. And yet you also tell us that those black marks were on that rope when you first saw it, isn't that true?

A. Yes, sir.

Q. How many painting crews using scaffold does Johnson Industrial Painters have?

A. Maybe ten.

Q. So ten different crews have scaffolds in Johnson Industrial Painters, don't they?

A. Well, I'm not sure there's ten but I'd say somewhere around there.

Q. Approximately ten scaffold crews, each crew has one or more sets of scaffold equipment, isn't that true?

A. Well, I don't know exactly how many they are, maybe they've got one.

Q. Well -

A. Each crew maybe has one.

Q. All right, but each crew of the ten has at least one set of scaffold equipment and maybe some crews have more than one set of scaffold equipment, isn't that true?

A. And, - it could be, yes.

Q. And Johnson Industrial Painters were doing various jobs in various times?

A. Yes.

Q. While they were also doing the Vermont Hospital job, isn't that true?

A. Yes, sir.

Q. And various scaffold crews were working around the State of Vermont and perhaps the State of New York, isn't that true?

A. Yes.

Q. And these scaffold sets are inter-changed or they are taken to jobs wherever they are needed, aren't they?

A. Yes.

Q. It's not a good idea to keep a scaffold at the various jobs if you are not going to use it you take it to some other job where you are going to use it, is that true?

A. Yes.

Q. Those scaffolds are switched back and forth among the ten various Johnson scaffold crews?

A. Yes.

Q. And isn't it a fact sir that the rope as you now see it today, coiled up there, looked just about the same back in 1971 when you saw it?

A. Yes, sir.

Q. And wouldn't you say sir, having had five years of experience at least five years of experience with rope,

that that rope is not a new rope?

A. I hear about it he said it was a new rope.

Q. He may have said it was a new rope but it sure doesn't look like it.

A. Looks like it to me.

Q. Does -

A. It's just been in pulleys, that's all.

Q. Does that look like new rope to you, sir?

A. Five years old.

Q. Five years old.

A. Not new.

Q. Not new, that rope never was used on scaffolds after this accident, was it?

A. To my knowledge, no.

Q. Obviously not, it's been broken in many parts.

A. Yes.

Q. That rope has not been, not ever used as a scaffolding rope after September 30, 1971?

A. Right.

Q. So the condition we see the rope in today is the same condition as it was the day after, or the day of the accident, isn't it, essentially?

A. Yes.

Q. Yah, when the scaffold crew is to do its work does it go from a, the top down on a building in a multi-story building, or does it go from the bottom up?

A. Top down.

Q. And why is that?
A. (No response)
Q. Why do you start from the top and go down?
A. Because if you're using wheels, the wheels rub in the stuff that you already did.
Q. In other words, if you are painting on the outside of the building the wheels would rub on the paint and strike it or mark it up in some way?
A. Yes.
Q. That would be true in this case?
A. Well, the staging could have rubbed on it.
Q. Yah, something would have rubbed on the building going down and so the best idea is to paint above where the wheels are, or staging is?
A. Yes.
Q. So after you finish painting up here, nothing more is going to touch the point?
A. Right.
Q. And you work on down. You arrived on the job Monday, did you not, from New York?
A. Yes.
Q. The week preceeding that Monday, where did you work?
A. I am not positive, but I think I worked at Dannamora Prison.
Q. Dannamora Prison, what was going on over in Dannamora Prison?
A. I painted a church steeple over there.

Q. And was this church steeple within the prison walls or outside?

A. Inside.

Q. And approximately how high in the air was that steeple?

A. 75-80 feet.

Q. Was there scaffolding involved in that?

A. They had a scaffold up, regular iron scaffold but we couldn't use it. I had to use a Boatswain's chair.

Q. Boatswain's chair?

A. Yes.

Q. Does that use rope, also, doesn't it?

A. Yes.

Q. Who was the foreman on that job?

A. Richard Nelson.

Q. Mr. Doney wasn't involved in that job?

A. No.

Q. You worked at Dannemora Prison all the preceeding week did you?

A. Yes.

Q. Did you do any work at the Pavillion Hotel in MOntpelier, Vermont?

A. I don't recall it.

Q. Did you ever see Mr. Doney's pick-up truck?

A. Yes.

Q. And it is in Mr. Doney's pick-up truck that all the scaffolding equipment is loaded, isn't that true?

A. Yes.

Q. Just throw it in the bed of the truck along with the buckets and the brushes and the bed of the scaffold, the pulleys, ropes and whatever else you need, isn't that right?

A. Yes, I guess so.

Q. Now, let's assume for the moment that Mr. Doney is mistaken in that that rope he thought was new, was not a rope, a new rope, then probably that rope came from a different job, didn't it?

A. Could be.

Q. Yah and you will agree with me that it looks to you like it was, has been used before, wouldn't it?

A. I have never used real new rope but that looks like new rope to me.

Q. You have never used in your five years with Johnson, brand new rope?

A. No, I haven't.

Q. So this rope then looks like brand new rope to you?

A. Well, not brand new, I have used like a 50 foot piece of rope and that was brand new, I mean, we just used it to pull stuff up.

Q. You know what new rope looks like and old rope?

A. That looks a little dirtier than that.

Q. That doesn't look like new rope, does it?

A. No.

Q. Can you suggest to the Judge and to the ladies and gentlemen of the Jury where this rope might have been used

prior to the Johnson, the Vermont Hospital job?

A. I have no idea.

Q. Well, give us, would you, the names of the jobs using scaffo'ding you have told us about Dannemora Prison, what else was being done in the Fall, early Fall or Summer of 1971 by your employer, Johnson INdustrial Painters?

A. I have no idea.

Q. You have no idea?

A. (Nodded)

Q. Well, where did you work the week before you worked at Dannemora Prison?

A. I am not positive but I think I worked at "Paystrent" (phonetic) Medical Center in Burlington.

Q. This is a multi-story building too, isn't it?

A. Yes, we didn't do any outside work there.

Q. YOu didn't do any outside work there?

A. (Nodded)

Q. Approximately how many scaffold high, this is outside scaffold jobs, did you do in the year of 1971 up to September 30th, 1971?

A. I'd say, three.

Q. And would you name them for us, please?

A. Well, one would be this place, the hospital, it would be the prison, -

Q. All right.

A. I don't know if there it was in St. Albans or not.

Q. What was going up at St. Albans?

A. Wheat grain place for AGWAY.

Q. Grain storage?

A. Yes.

Q. That is a multi-story building too, isn't it?

A. Just big tanks.

Q. What I mean, is there, they are several stories high?

A. Yes.

Q. And can you give us the approximate height of the grain storage bins or tanks?

A. Hundred feet.

Q. And what were you doing to those tanks?

A. Painting them.

Q. When you paint this is a cylindrical tank is it?

A. No, square.

Q. Square tanks, do you paint from the top to the bottom, one side, then go around top to the bottom the next side?

A. Yes.

Q. And that is the way you would do the Vermont Hospital, wouldn't you?

A. Yes.

Q. Do all one side top to bottom, then move around to the next side and go from the top to the bottom and keep on going?

A. Yes.

Q. Do you recall when you did the AGWAY, St. Albans job?

A. (No response).

Q. Just approximately?

A. No, just a long way back.

Q. Would it be Summer or Spring of 1971?

A. Within the summer, I don't know what year.

Q. Okay, how close did you get to the, these plasterers you say were wearing white or black gloves, had brushes, wire brushes and were cleaning white stuff off the side of the building?

A. I walked right around the corner of the building where they worked.

Q. Right close by you, then?

A. Yes.

Q. First time you saw the rope that is in question here today is when it was all rigged up in pulleys brought into their job site by Mr. Doney, isn't that true?

A. Yes, sir.

Q. It was already completely strung through the pulleys and all you had to do was hook on to the scaffolding and on to the top of the building?

A. Yes.

Q. And it is relatively simple affair, isn't it, to hook the bottom and pull on to the scaffolding and the top pulley up to the top of the building?

A. Yes.

Q. And just a minute, Your Honor. Mr. Martin, I'd like to take the plaintiff's exhibit #2 and with that pink pen here, would you mark circles around those blackened

areas on the rope that you saw?

A. (Doing so)

Q. I want to show you now Mr. Martin, Defendant New Bedford Cordage's exhibit for identification, "A", that is a, what is that "A", and I ask you if you can tell us what that photograph depicts?

A. These are pieces of rope.

Q. Well, could you be more explicit and tell us where the rope is?

A. Hanging on the side of the building.

Q. Could you tell us which building it is?

A. Do you want me to mark off the black spots?

Q. That is the Hospital job, isn't it, sir?

A. Yes.

Q. Okay would you mark the black spots on Defendant's "A" for us?

A. (Doing so)

Q. You have done that all in pink, have you, Mr. Martin?

A. Yes, sir.

Q. All right now, let me show you Defendant New Bedford Cordage's "B" for identification and ask you if you can identify that rope and that scene?

A. That is the other side of the staging.

Q. All right, has the same rope that we have been talking about, that is it, isn't it?

A. Yes, sir.

Q. St. Johnsbury Hospital job?

A. Yes, sir.
Q. And the rope depicted there is the rope that was supporting your end of the scaffold, isn't it?
A. Yes.
Q. All right now, would you mark on that photograph the darkened areas as you can see those darkened areas in the photograph?
A. (Doing so). Don't show up too good.
Q. You mean the color?
A. Yah.
Q. Well, let's see, I got these from my daughter, some of them may not be too good.
A. How about white?
Q. I don't have a white one. Try an orange one?
A. (Doing so).
Q. Well okay, orange looks like it is coming out. Okay, you've got at least a couple black areas there circled, don't you, sir?
A. Yes.
Q. And these areas that you have circled for us were right on your end of the scaffolding, as that scaffolding was being hoisted up in the air, isn't that true?
A. Yes.
Q. And your hands were on that very rope that you have been circling isn't that true?
A. I can't say that, no.
Q. Well, explain to us then how you got the scaffolding up by

pulling on these ropes?

A. It could have been inside the pulleys, I mean you have a good five pipe lengths of rope, the whole length of the pipe and the five runs together could have been twisted at an angle where you couldn't see them, one could be behind the other one.

Q. But as you pull on this rope all of the lengths of rope is going through your hands or it is right by your face, isn't it?

A. Well, not very often, not often do I look at the rope.

Q. Well, let me make a presumption here for a minute. We have a little black piece of rubber on the floor here and let's pretend that is the scaffold bed. Can you see that from where you are?

A. Yes.

Q. All right now, I have another one and let's say that is the, I'm standing now on the scaffold. See what I am trying to depict here in my little example, okay? I'm standing on the scaffold bed and there's a series of ropes going up, aren't there?

A. Yes.

Q. And there's another man on the other end and he pulls and you pull, isn't that true?

A. Yes.

Q. You are pulling on these ropes, isn't that true?

A. Yes.

Q. And these ropes are right in front of your eyes, aren't

they?

A. Yes.

Q. Those black spots are going right by your eyes, aren't they, as you are pulling on the rope?

A. I don't look at the rope.

Q. What do you look at if the, you don't look at the rope?

A. The building and the ground.

Q. You just keep pulling and never look at the ropes?

A. I might have glanced.

Q. And you, you well knew that this rope was discolored and had these funny looking black splotches all over it, didn't you?

A. I imagine, yes.

Q. Yah, okay, I believe that is all I have at this time, Your Honor, we do offer in connection with the witness' testimony though, Defendant New Bedford's "A" and "B",

MR. TYLER: NO objections, sir.

MR. AFFOLTER: No objections.

MR. MILLER: No objections.

MR. BYAN: No objections.

THE COURT: Defendant New Bedford's "A" and "B" are received.

CROSS EXAMINATION BY MR. AFFOLTER:

Q. Mr. Martin, I want to be sure about this today, do I understand you correctly that at a particular site you and Marvin or the rest of your crew, had not done any work on the scaffold prior to the time the accident

occurred?

A. True.

Q. Hadn't done any work the day before, Monday, Tuesday, Wednesday on the scaffold?

A. No, I didn't.

Q. You triedto put up the steel cable scaffold but that didn't work out?

A. Right.

Q. YOu didn't do any work on it, you tried to put it up?

A. Right.

Q. And the only reason that you didn't use the steel cable was because of the fact that you couldn't quite reach the top of the building with the steel cable mechanism is that right?

A. Right.

Q. And you don't have any preference yourself, between steel or rope, you take Mr. Doney's advice on that subject?

A. Right.

Q. And Mr. Doney's - Mr. Doney is the fellow who was the foreman of the Johnson INdustrial Painting and he made the decision as to what kind of scaffolding and what kind of equipment to use, is that correct?

A. Yes.

Q. You accepted his advice?

A. Yes, sir.

Q. Let's take the rope as an example, if Mr. Doney comes and says that it is brand new rope and never been used

before, you just take his word for it, you don't bother to inquire any further, is that fair to say?

A. True, looked like new rope, so we used it.

Q. By the same token, if he came to you and said he had used it on four or five other jobs, that wouldn't have concerned you at all?

A. No.

Q. If it looked like it had been used a few times, that wouldn't have concerned you a heck of a lot?

A. Yes, - no.

Q. In fact, you said you seldom had seen brand new rope or you had never seen brand new rope on the project before?

A. True.

Q. So probably you didn't know the difference between rope that had been used a little or a lot?

A. I imagine you could tell it if I took the rope out of the box.

Q. How about looking at the rope today, does it look like new rope today?

A. No, not brown.

Q. Didn't look like brand new at the time?

A. Well I didn't know how long he had had it either at the time.

Q. Do I understand you now Mr. Martin that there was discoloration on the rope the day of the accident and that you were aware of that before the rope broke?

A. I, well, it looked like any other rope to me.

Q. But you had, you saw the discoloration on the rope before it broke?

A. Some discoloration, yes, sir.

Q. That's your testimony today?

A. Yes.

Q. Does the Court have the witness' deposition here in the file?

THE CLERK: Do you wish to open it, Your Honor?

THE COURT: Yes.

MR. AFFOLTER: I would like to proceed while he is doing this.

THE COURT: Yes.

Q. Mr. Martin, do you remember our taking your deposition, that procedure whereby we got together with Mr. Miller and the other attorney and we asked you a bunch of questions back in 1974 and I think it was, and about the accident and your injuries and so on and you answered those under oath before a court reporter and later we read the deposition and you signed it?

A. Yes.

Q. Do you remember that?

A. (No response)

Q. You did read the whole thing to see if there were any mistakes in the way it was transcribed?

A. Yes.

Q. And I show you what appears to be a copy of that deposition and has #24 in the upper right-hand corner and it

appears that it was taken on June 27, 1974. Does that sound about right?

A. Right, yes, sir.

Q. And you signed it before a Notary Public which appears to be Attorney WOLFE in Plattsburg, is that right?

A. Yes.

Q. And do you remember what your testimony was at that time at the time your deposition as to whether you observed any discoloration on the rope?

A. I don't recall.

Q. Remember whether we asked you specifically as to whether there was any discoloration?

A. (No response).

Q. Don't recall that?

A. No.

Q. I'd like to refer you to page 40, line 21, where I asked you or somebody asked you, "Was it discolored at all?" What was your answer?

A. Here?

Q. Yes.

A. No, it wasn't.

Q. So back in 1974 which was a couple of years closer to the date of the accident than it is today, you felt there was no discoloration on the rope on the date of the accident, is that fair to say?

A. Yes.

Q. But today you feel there was some discoloration at that

time, is that fair to say?

A. Yes.

Q. And it is your testimony under oath that scaffold or no other scaffold had been used by your crew to do any work above the ground prior to the time this accident happened?

A. With that rope?

Q. With anything.

A. On that job?

Q. Yes.

A. No.

Q. Everything you had done had been on the ground?

A. Yes.

Q. All right.

A. Well, we used a little baker's scaffold, it goes 8 feet off the ground.

Q. So you could reach maybe what, ten feet up?

A. 10-12 feet, yes, sir.

Q. I show you a deposition, that is not the right exhibit.

MR. ERDMANN: Do you want the ones that -

MR. AFFOLTER: I'll use the plaintiff's.

Q. I show you plaintiff's #1, 2, 3, 4, 5, 6, 7, Plaintiff's #1 through #7, which are all the photographs that plaintiffs have offered, are those all the photographs of this accident, do you know?

A. I don't have any idea.

Q. Do you see any steel cable in any of those photographs?

A. No.

Q. Did you see any other photographs in which the steel cable is shown?

A. No.

Q. Do you recall seeing any photographs in which steel cables were shown?

A. No.

Q. At any rate none of these have been offered at this point or are not shown in any of those photographs, is that correct?

A. (No response).

Q. They are not shown in any of those photos?

A. No.

Q. Okay, some people have talked about a foreman and a Mr. Doney being a foreman on the project, what's a foreman's job for Johnson on this project, what's he supposed to do?

A. See that everything is working good.

Q. Just to see they are not goofing off is that all he is there for?

A. Make sure everything is done right.

Q. Make sure the job is being done properly?

A. Yes.

Q. How about safety, does he have anything to do with that?

A. Oh he did it the safest way possible.

Q. To the best of your knowledge, you tried to work as safely as you could at all times?

A. Right.
Q. And the purpose of a safety line is not to hang on to when you are going up the scaffold as I understand?
A. Well.
Q. Just to have nearby to steady yourself as you walk back and forth on the scaffold?
A. Every job that I have worked on they use them that way, right.
Q. You have never seen anybody in the Johnson or anybody else in the other painting contractors people working on a scaffold who used the safety lines by securing their body to the safety line in any way?
A. No, I watched them on the Point Bridge and they had snaps that hooked on to the bridge.
Q. What do you mean, "snaps"?
A. Only four or five feet long, it could snap it right to the top of the thing where they were working.
Q. You mean, to a rope?
A. No, to a fence that was on top.
Q. Okay, that wasn't utilizing the rope or the cable?
A. No.
Q. How about with rope or cable have you seen any safety lines people attached to their bodies?
A. No.
Q. Why do you call them safety lines, is that the term you used to take?
A. If we had got a chance to tie off in your hanging on

to that rope when it broke, you could have your hand on it, you wouldn't have fell.

Q. Mr. Martin, 3 feet is 30 feet and 40 feet, is 40 feet, whether you are on the way up or already there, isn't it?

A. Yes.

Q. And it is going to hurt just as much as if you are on the way up and fall or already there and you fall, isn't that correct?

A. Yah but we didn't have time to snap and tie off the rope every five feet.

Q. Mr. Martin, what saved you from being killed in this case was because you grabbed on to a rope within grabbing distance?

A. I grabbed the same rope I was pulling up on.

Q. And if you had a safety line within grabbing distance and if you had both of the safety lines within grabbing distance, even if you hadn't had a snap or any other device to keep being snapped when you fell, your lives would have been saved, Mr. Mousseau's life would have been saved and you would not have been injured?

A. Apparently so.

Q. That is not something you ever gave any thought to in using scaffolding prior to this accident?

A. No.

Q. Is it something you give thought to now?

A. I guess so.

Q. When you left Johnson Painting or you were laid off 2 or 3 days after you were returned a few months after this accident occurred, you wer n't laid off because of your injuries, were you?

A. No.

Q. You were laid off because Johnson did not have enough work to keep all its men busy?

A. That's what he said.

Q. You don't mean to imply you were laid off because you were injured or afraid of heights?

A. I don't know the reason.

Q. Was anybody else laid off?

A. Yes.

Q. Okay, they didn't suffer any injuries?

A. No.

Q. As I understand that your employment in the black topping business has been somewhat seasonal and so your income hasn't been as great as it was before, is that right?

A. Yes.

Q. The painting business was also seasonal business, wasn't it?

A. I worked most of the time, though.

Q. I thin' you told us the time of your deposition, you, every year, would work during the season and you would then collect unemployment compensation for certain periods of the year, is that correct?

A. Not as much as black topping.

Q. Well, but the fact is that you did collect unemployment compensation every year that you worked for Johnson because there were times of the year when you couldn't work, they didn't have enough work?

A. I don't know if I collected every year, but -

Q. Fairly consistently?

A. Yes.

Q. Okay, was Marvin Mousseau ever a foreman of your crew?

A. Yes.

Q. When you worked on painting jobs how would Johnson determine who would be the foreman on any given project, do you know?

A. Where he sat on the job first.

Q. Was the foreman, does he come ahead of everybody else to get things arranged or set up or something?

A. Yes.

Q. And in this particular situation, it was Mr. Doney who came before the others and made preparations?

A. Well, I guess that morning I think he had another job to go to first, then he came to our job.

Q. Was he there when the accident happened?

A. No.

Q. Did he see you test the scaffolding?

A. I don't recall.

Q. Who was in charge while he was gone?

A. Well, we just - he was just appointed because he was foreman on one of the other jobs.

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Q. He was sort of a senior man?

A. No, he, you can say that I guess.

Q. Did you really need any leadership at that time or did you just do what you had to do?

A. Do what we had to do.

Q. You had done it before?

A. Yes.

Q. You used three-quarter inch manila rope on many projects before this?

A. Yes.

Q. There are a number of details I'd like to straighten out Mr. Martin, concerning equipment that was used here, one of them are the safety lines. Do you know what type of rope the safety lines were?

A. That was three-quarter inch, too.

Q. Where did that come from?

A. I don't know.

Q. No idea?

A. (Nodded)

Q. How new was it?

A. I don't remember.

Q. No idea?

A. May I look at these?

Q. No, you remember from your own recollection?

A. I'd say it was older than that.

Q. Where was it that day, where did you get it before you put it up?

A. I don't recall that.

Q. Where did you get the platform, the aluminum platform before you put that up?

A. I believe that was already on the job.

Q. Wasn't something that was brought in a pick-up truck that day?

A. No.

Q. But rope was brought on the pick-up truck that day?

A. Yes.

Q. Rope was already in the pulleys?

A. Yes.

Q. Was the rope in a carton box or container of any kind at that time?

A. No.

Q. It was not?

A. No.

Q. How about the 2 by 4's or whatever you used as a back rail,

A. WE got those right on the site.

Q. Where did you get those?

A. Right at the site.

Q. How high was the building in your estimation?

A. 45 foot, 48 feet.

Q. How high was, how high were your feet when the scaffold reached its highest point, approximately?

A. How high was my head from the top of the building?

Q. No, how high were your feet from the ground?

A. 40 feet.

Q. How high were you from the ground, your feet, when you

fell?

A. Maybe 32 feet.

Q. 32 feet?

A. 30-32 somewhere around in there.

Q. How high is this court room from floor to ceiling?

A. 18 feet.

Q. Do you have a ladder a regular extension ladder at the time the accident occurred?

A. No.

Q. You didn't?

A. I don't think we did.

Q. Do you know anything about the pulleys that were used whether you had ever seen them before?

A. I don't recall seeing them, they looked brand new.

Q. If Mr. Doney had told you that day that the pulleys and the rope had been used on3, 4 or 5 times before, would you have any reason to disagree with him?

A. NO, unless they don't use them very much.

Q. But they have been used 3, 4, 5 times, if he said that, you would have no particular reason to disagree?

A. No.

Q. Do you have any idea as to what the length of the safety lines that were installed at the time were?

A. It was all one piece.

Q. The safety line was all one piece?

A. Yes, sir.

Q. Do you have any idea how long it was?

A. I don't know, maybe a couple hundred feet.

Q. You have no idea where it came from, do you know whether it was part of the same rope that was used on the scaffolding?

A. No, it wasn't the same rope.

Q. How do you know that?

A. Itlooked a little older.

Q. Do you ever or did you ever have any conversation with anybody about where that rope came from?

A. No.

Q. Did you ever have a chance to look at it carefully other than the photographs after the accident occurred?

A. No.

Q. What's the strength of the breaking strength of three-quarter inch manila rope supposed to be?

A. 5400 pounds.

Q. When did you learn that?

A. I don't know.

Q. Did you always know it?

A. No.

Q. Did you know it before the accident occurred?

A. No.

Q. Do you know what the breaking strength of half inch manila rope is?

A. No.

Q. One inch?

A. No.

Q. Two inch?

A. Never heard of it.

Q. Okay, nothing other than three-quarter inch?

A. no.

Q. Can you explain to me what different areas of the building you were going to be putting this pre-coat on, how many different levels would you be working on?

A. All three.

Q. Are these shown as 3 narrow layers of concrete sort of separating the stories of the building

A. Yes.

Q. One is right at the very top?

A. Yes.

Q. One is between the second and third floor?

A. Yes.

Q. And one is between the first and second floor?

A. Yes.

Q. Had any of that work been done prior to the time the accident occurred?

A. No, looks like it has though.

Q. Where in the relationship to the position of the scaffolding at the time of the accident, had the men been working with this smelly substance applying it with gloves, brushes and so on?

A. Right on the bottom.

Q. The bottom of this particular area?

A. Yes.

Q. As you observe the photographs of the accident scene, does it appear to be clean in this area and dry, or do you see any sign of any corrosive substances, any puddles of any sort anywhere?

A. No.

Q. Do you remember seeing any at the time of the accident?

A. No.

Q. In your judgment, Mr. Martin, was there anything that day after the accident to put a person on notice just from looking at the rope that there is anything wrong with it?

A. No.

MR. AFFOLTER: That is all we have.

CROSS EXAMINATION BY MR. MILLER:

Q. Mr. Martin, I think you have told the court and the jury that prior to putting up the rope scaffolding, you had actually erected the scaffolding that was held there by the cables, is that correct?

A. Yes.

Q. All right now, in order to erect the scaffolding that was held by cables how long woud it take you to do that?

A. Roughly about the same time it would have to put the rope up.

Q. Four or five hours?

A. Yes.

Q. That is quite a heavy scaffolding, one that is held up by cables, isn't it?

A. Yes.

Q. It is quite a bit more heavy than the one held up by the rope, is that correct?

A. It goes up easier because it cranks.

Q. But as far as the weight goes, the scaffolding that held up by the cables, is quite a bit heavier than the one help up by rope, is that true?

A. Yes.

Q. And it is easier to work with one that is held up by the rope, isn't that right, easier for the fellows who have to pull it up and down?

A. No.

Q. YOu don't think so?

A. No.

Q. Would you say they both work about the same?

A. Well, one is a little quicker, that's all.

Q. Which one is a little quicker?

A. The rope.

Q. And isn't that why you decided to use the scaffolding with the rope because it is quicker and easier to use?

A. No.

Q. Now, isn't it a fact that in spite of your testimony here today at the time of the deposition you told us that it was Mr. Mousseau who made the decision to use the scaffolding with the rope in preference to the cable?

A. I guess him and Harold talked it over and I guess they come to a decision.

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Q. All right, at the time you remember the deposition?

A. (No response).

Q. Do you remember that occasion?

A. Yes, vaguely.

Q. That all you see here were there at that time?

A. Yes.

Q. You were there?

A. (Nodded)

Q. We asked you a lot of questions, do you remember that?

A. Yes.

Q. And isn't it fair that at that time that we asked you whose decision it was to use either the rope or the cable and you told us that was Mr. Mousseau's decision?

A. I think Marvin and -

Q. Would you answer my questions is that what you told us at the time?

A. Yes.

Q. Page 34. Now you say that Mr. Mousseau and Mr. Doney talked it over and then the decision was made, is that your testimony today?

A. Yes.

Q. Although you didn't tell us that at the time of the deposition, is that fair?

A. Yes.

Q. All right now, so then you spent approximately ten hours in rigging scaffolding before you began any work on that job, isn't that right?

A. No.

Q. Well, didn't you tell us that you spent about four to five hours to rig the cable scaffolding and then decided not to use it and then had to spend four or five hours to rig the rope scaffolding?

A. It doesn't take long to put the "fish" hooks up on the roof, see, you don't need all that rig up there.

Q. I might have misunderstood it but I thought I asked you how long it took to rig the cable scaffold and I thought you said about the same time, did I understand you correctly?

A. You understood me, yes.

Q. Didn't you tell us it took four to five hours to rig the rope scaffolding?

A. Yes.

Q. And four to five hours being the same time to rig the cable as a total of nine to ten hours, is that right?

A. Yes, but I got a bit mixed up.

Q. Isn't nine to ten hours correct?

A. No.

Q. Well, what is correct?

A. Well, you can hook up the steel ones in 45 minutes to an hour and the other ones the rope, it take you all that time to carry everything and put it on the rope.

Q. All right, so this I want to be absolutely clear on this, how much time do you claim was totally spent in rigging all the scaffolding before you began any work on the

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project?

A. Maybe five and a half hours.

Q. Is that for both scaffolds?

A. Both of them.

Q. So when you told me the same amount of time for the rope you made a mistake?

A. Yes.

Q. Now, would you tell the Jury a little bit about the size of the project upon which you were working? Was this a pretty big building?

A. Yes, pretty good-sized.

Q. It was what, three stories high?

A. Yes, sir.

Q. And what was the approximate dimensions of the building itself?

A. Hundred by three hundred.

Q. It was a hospital, was it?

A. Yes.

Q. Were you ever inside of the building?

A. Yes, sir.

Q. YOu saw what the inside of the building looked like at that stage of the construction?

A. Yes.

Q. And did it have a lot of different rooms in it?

A. Yes.

Q. Was there a lot of work going on on the inside?

A. Yes.

Q. Electrical wiring, plumbing, things like that?

A. I just walked through it and didn't pay much attention.

Q. All right, what did you notice as you walked through it?

A. There's a lot of room, that's all that I -

Q. Were there a lot of tradesmen working there?

A. I didn't see that many.

Q. About how many rooms would you say were going to be in this hospital?

A. Couple hundred.

Q. All right in that at the time that you came there in September of 1971, at what stage of completion was the project? --- the outside was all finished, wasn't it?

A. I know we were going to finish the outside.

Q. YOu were going to apply the pre-coat to the concrete, is that correct?

A. Yes.

Q. And the rest of the exterior was brick, is that right?

A. Yes, sir.

Q. And that was all finished, right?

A. Yes.

Q. So you, after you people would have applied the pre-coat that would have been all that had to be done to the outside of the building, is that fair?

A. Yes.

Q. As a matter of fact, don't painters come on the scene toward the end of a project so that when they get finished their painting, no other tradesmen will mark

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it up and spoil it?

A. Well you have to spot steel and stuff like that.

Q. I'm sorry.

A. You have to spot steel wherever they, well, or something like that, you have to prime coat it so there are, they're pretty early.

Q. But as far as the exterior painting now such as you were going to do on this project?

A. Yes.

Q. All right, you weren't going to spot any steel on the hospital, were you?

A. No.

Q. All right so as far as you were concerned you were going to apply this pre-coat to the exterior of the hospital is that right?

A. Yes.

Q. And kind of finished coat, isn't it?

A. Yes.

Q. All right, it's for decorative purposes as well as waterproofing, is that right?

A. Yes.

Q. All right, as a matter of fact, wasn't the architect very concerned with the shade of the color of the material that you were going to apply?

A. I don't know.

Q. All right but in any event you will agree that you would come on a project toward the end of the construction

so that when you finished applying this exterior coat for decorative purposes, no other trade would have to work there and spoil your nice paint job?

A. Yes, usually.

Q. And that is the way is was on this hospital, isn't that fair, as far as you were concerned?

A. Yes.

Q. All right now, Johnson INdustrial Painters were the prime painting contractor on this job, weren't they?

A. Yes, sir, I believe so.

Q. And how many people does Johnson employ in this whole corporation for painting?

A. Now?

Q. At the time of the accident, to the best of your judgment?

A. Maybe a hundred.

Q. And it is all run out of the Plattsburg office, is it?

A. No.

Q. They have other offices?

A. Yes.

Q. Where are the other offices?

A. Lowell, New York and Burlington.

Q .Burlington, Vermont?

A. Vermont, yes.

Q. And this was true in 1971?

A. I believe so, yes.

Q. And that hundred people would be a combination of those 3 offices and all the men involved or are there more?

A. Yes.

Q. By yes, you mean it is a combination?

A. Yes.

Q. Hundred men in all, working out of 3 offices?

A. Yes.

Q. Now you told this jury that the safety lines, the life lines were tied to a pipe on the roof, is that correct?

A. I believe it was a pipe, yes.

Q. All right now, the scaffolding itself was tied to some timbers that came off the roof on an angle, is that right?

A. Yes.

Q. Okay, why don't you tie the lifelines to the same timbers?

A. I don't know, never did before.

Q. Well, isn't the rope that you tie them to something separate, is that you wasn't to have an independent source of suspension so that if something should happen to those timbers or that scaffolding, you would have another line tied to something independent that can hold you up to prevent you from falling?

A. I think so.

Q. You knew that at the time, didn't you?

A. (No response).

Q. Just common sense?

A. Just never thought about it before.

Q. Just common sense?

A. Yes.

Q. Now, I understand at the time of the deposition you told us that when you saw this man wearing these rubber gloves and using what you thought was acid, that you didn't have any equipment on the job at that time?

A. Right.

Q. And when I say you, I mean Johnson Industrial Painters.

A. Yes.

Q. So that your staging and your rope and everything, it arrived at some other day than the day that you saw somebody with rubber gloves using what you thought was acid?

A. Yes.

Q. And you told us that the rope when it arrived on the job site was taken right out of the pick-up truck and in a matter of minutes, put up right beside that building is that correct?

A. Yes.

Q. Those people you had seen were, those people with the acid, or what you thought with acid, weren't there at that time?

A. No.

Q. That building was dry at that time?

A. To my knowledge, yes.

Q. Did the lifelines break in this accident?

A. No.

MR. MILLER: NO further questions.

CROSS EXAMINATION BY MR. BRYAN:

Q. Mr. Martin the day you put up the cables was that the day prior to the accident?

A. Yes.

Q. I see and that would have been a Wednesday, is that right?

A. Yes.

Q. And what did you do during that day other than put up the cables?

A. I'm not positive, I think in the afternoon we left on the roof to see what we needed to put up the ropes because he was going to "mean" the ropes the next day.

Q. Did pretty much the entire day get consumed with putting up the staging with the cables and cranks and fish hooks taking it down and then figuring out what you were going to do for the next day?

A. No.

Q. What else did you do then?

A. I worked on the lower section.

Q. I see, put some of the pre-coat on the lower section?

A. Yes.

Q. I see and that's what you could get to do standing on the ground, you mean?

A. Yes.

Q. Okay what did you do Tuesday?

A. The same thing.

Q. Standing on the ground?

A. Yes.

Q. And in other words you, - Monday, too?

A. We did all the ladder work, yes.

Q. You could essentially walk around the whole building is that right and do this work where you could stand on the ground and get most of that work done?

A. We had to have a little baker's scaffold.

Q. What's that?

A. Something on four legs, you just carry around with a couple of planks on it.

Q. How high does it get you up?

A. Six feet, eight feet.

Q. In other words, you couldn't do the ceiling on this?

A. No.

Q. But you could do perhaps we are looking over here, you could do the top of the moulding around the door and -

A. Maybe go higher than that.

Q. That's about what you tried to do with that staging?

A. Yes.

Q. That consumed pretty much your time from Monday right on through Thursday morning, you got there Monday, you probably had some materials to get on the site, your pre-coat mix and all of that stuff?

A. I think we have finished everything by Tuesday night on the lower section and then my father and brother worked inside in the morning, me and Marvin worked on the outside.

Q. So you got the lower stuff done without staging and the, what you could do on the ground all up through Thursday,

through Wednesday and then on Wednesday you also had tried to rig the staging in with the cables that didn't work out?

A. Yes.

Q. Okay perhaps we could, if you can help me, just a second to move this blackboard around so the jury can see. YOu can step down if you would.

A. (Doing so).

Q . Hold that in your hand if you will so Mr. Vesper can hear you if you would. Okay, I show you here Defendant George Asmussen's "B" for identification and ask you if you see something down in the lower right-hand corner of that picture?

A. It's a steel cable set.

Q. Okay is that one of the two steel cable sets that you used on the staging on Wednesday?

A. Yes, sir.

Q. Okay, tell us generally what Defendant's "B" shows you, Defendant's "B" for identification, just generally for the jury' benefit or the record, just identify the picture for me.

A. It's a picture of the hospital with the staging all down.

Q. That generally gives a pretty good frontal view of the building?

A. Yes, sir.

Q. Okay with counsel's permission I would like to offer "B".

MR. MILLER: No objections.

MR. AFFOLTER: No objections.

THE COURT: Defendant's "B" is received.

MR. TYLER: Could the plaintiff take a look at it?

THE COURT: Oh, I thought you had looked at it.

MR. TYLER: No objections.

THE COURT: Defendant's "B" is received.

At this time the Court has another hearing that's been previously scheduled so we will recess at this time until Monday morning at 9:30. The Court has other matters tomorrow to tend to. By adjourning court at this time I want to again stress the point that you must not discuss the case with any person or listen to any discussion of the case from any source. It is highly important that you do not be exposed to any broadcast or news media or any conversation that may relate to the case in any way. I hope you have a pleasant weekend and we will see you Monday morning at 9:30.

(At 2:55 p.m. 3 June 1976 this trial adjourned until 9:55 a.m., 7 June 1976 at which time it was reconvened).

MR. BRYAN: Mr. Martin, good morning ladies and gentlemen.

JURORS: Good morning.

CROSS EXAMINATION OF MY MARTIN RESUMED BY MR. BRYAN:

Q. Mr. Martin, I think we were talking about various aspects of this building when we were finishing up last Thursday, let me ask you one question however, before we

continue in that vein. You were earning some $2.75 an hour at Johnson Construction when you, Johnson Painting, when you working for them at the time of this accident?

A. No.

Q. What were you earning?

A. I think it was four and a quarter.

Q. This is at Johnson now?

A. Yes, sir.

Q. Now, do you have any records to that effect?

A. No.

Q. YOu don't?

A. I don't think so.

Q. Your, - this is just your recollection, is that correct?

A. Yes, sir.

Q. Now, -

A. That is for doing the high work, I think it was four and a quarter.

Q. I see, what was it for regular painting?

A. $3.75.

Q. $3.75?

A. (Nodded)

Q. And is this just your memory now that you don't have any records in your possession that would -

A. I don't believe I had.

Q. Okay, what are you earning now, Mr. Martin?

A. $8.75

Q. $8.75 an hour?

A. Yes, sir.

Q. Okay now is this for high work or low work?

A. Low work.

Q. And is there a difference between the high and low work in the painting industry?

A. Yes, you get more money if you go high.

Q. How much more money?

A. I don't know what it is now.

Q. How much did you earn at the paving contractor when you went to work for them?

A. $4.00 an hour.

Q. Okay so in fact you were earning more at the paving contractors than you were from Johnson at the time of the accident? ---- Were you not?

A. What do you mean by that?

Q. I mean by the hour.

A. Well, I was making more in another way, I wasn't, I wasn't working as long.

Q. Well, you were making more by the hour, per hour at the paving contractor?

A. (No response).

Q. You just got through testifying that you were earning $4.00 an hour at the paving place and you were earning $3.75 at Johnson?

MR. TYLER: I don't believe that was the testimony. I thought he said $4.25 for high work.

THE COURT: Well you can ask to clarify it.

A. Doing high work I was getting $4.25.

Q. Doing low work you were getting what?

A. $3.75.

Q. $3.75 how did I, do I remember last Thursday you said you were doing work, high work about half the time?

A. Yes.

Q. Okay, so you were averaging about $4.25 an hour?

A. Yah, I said so.

Q. Okay that is it as you recall, you were earning back at that time?

A. Yes, sir, but I worked more painting than I did.

Q. It was also required whether you collected unemployment for the time off, is that correct?

A. Yes.

Q. Now can you tell us what your, you look at your tax returns and they showed the amount that you earned from each of your employers, that is the paving contractor and the Johnson, how about when you, when all is said and done for the year, including the unemployment, what was the difference in your pay?

A. I never looked at it like that.

Q. You don't have those figures?

A. I don't have my record.

Q. You could obtain them, couldn't you let us have them later in this trial?

A. Yah, I guess I could.

Q. To see what the actual yearly difference was before and after the accident, do you understand what I mean?

A. Yes, sir.

Q. Now I think we spoke in the Defendant's Exhibit "B", what was that little thing in the lower right-hand side?

A. Cable.

Q. That is a reel of cables, is it not?

A. Yes, sir.

Q. And isn't that one of the - you had used that in place of the ropes that you eventually did use?

A. We used it in place of -

Q. That's what you started to use before you did use the ropes?

A. Yes.

Q. In fact, that's the actual one right there, is that right?

A. One of them.

Q. The other one just isn't in the picture?

A. Right.

Q. okay now, are these really just a reel of cable with a handle on it so you crank yourself up to the building?

A. It's not that type of a crank, it's a big handle on it.

Q. Yah, but it in effect, turns the reel so that it winds the cable up on the reel, is that correct?

A. Yes.

Q. Sort of like a fishing reel only a great big one.

A. Yes.

Q. Now, there's a hook on that, is there not?

A. Yes.

Q. Does that hook show in that picture?

A. Part of it does.

Q. Well you can see it if you look very carefully, can't you?

A. Part of it.

Q. Isn't it lying right on top of the - hanging right from the rig there, isn't it?

A. Yes.

Q. Now, tell me if this is how it looks. This is a loop here like this? Something like that?

A. No.

Q. How does it look? I can't see very well from the picture but I assume it looks something like that?

A. It's one big fish hook.

Q. Well, I'm saying the hook itself?

A. NO, it doesn't look like that.

Q. Well, how does it look then. Draw, you draw how it looks then.

A. (Going to the blackboard and drew on same).

Want to draw how big it is?

Q. Well just draw a picture of it.

A. (Drawing). Mumbling.

Q. You'd better speak up because he can't hear you.

A. That is right there.

Q. Okay, so what you are saying then it has a backward "S" curve to it is that right?

A. That's right I guess that is how you would put it.

Q. Is this part here, - you can keep the chalk, - this part

here is where the cable goes in?

A. Yes.

Q. And this part goes up to the roof?

A. Yes.

Q. Okay, would it be fair to say then that if when you were working up there, the side of the building then would come down something like this, the top of the building would be like that and this hook would be placed over the top of the building?

A. This would be pressed right against the building.

Q. So you had put the hook in as far as you could on the building?

A. Yes.

Q. And then this would hang the cable down, right?

A. Yes.

Q. Now tell me again what was the big problem about using these cables? Why couldn't you use it?

A. Can I tell you about this?

Q. No, you can refer to it if you want to. Tell me any way you want to.

A. (No response).

Q Tell the jury what was the problem so they can understand why couldn't you use the cables, why do you have to use the - -

A. Well when we got to the top the staging tipped way out on a slant.

Q. Well when you say you got to the top, are you talking about

this part here? Facing it?

A. The staging fit on the outsidein here. See, the bricks jut out from the building and part of your staging is out here and when you get to the top it went just like that, it just tipped.

Q. Okay.

A. See this place over here, you have a real jutting out to touch that brick, when you get up there the whole staging would just twist.

Q. What's the difference the way the staging was rigged with the length of ropes instead of cables?

A. It opens out from the building.

Q. So you were able to get the point of your cables out farther away from the building, is that correct?

A. Plus the hooks were right here, you couldn't get the tops because the hooks were right against the building.

Q. Now, assuming that this is the front of the building as you look down on the building and this is the roof. Show me, with a piece of chalk on here, how you anchored these four by fours or whatever they were?

A. (Writing on the blackboard). Now that is four by four's with boards on the top. We put bags of sand right there. I don't know if they were sand but concrete or something but cement blocks on top of these boards. I think there was about 20 of them.

Q. So there's just weight in here to counteract the weight of the two men on the platform up here, is that right?

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A. Right.

Q. Okay and how did you get all of that stuff up there?

A. There was a hole in the rubber right here.

Q. And chairs or a ladder coming up through there?

A. Yes.

Q. Okay now, where did the safety lines go?

A. Right there somewhere.

Q. What was that?

A. (no response).

Q. What was that?

A. It was a pipe or a big square, one of them louvres.

Q. Ventilator?

A. Yah, something like that.

Q. YOu tied them to that?

A. Yes.

Q. Now do we see the safety lines in this picture, Defendant's "B"?

A. Yes, right in there.

Q. Okay. Bob do you have your little crayons or whatever they are? Could you mark with a check mark or I'll do it here, you say that is one of the safety lines?

A. Yes, sir.

Q. I'll use a blue mark right there and write "safety line" is that the correct one?

A. Yes.

Q. And is this another safety line right there?

A. That is a shadow right there.

Q. Am I on the safety line?

A. Yes, that's it.

Q. Okay and have I so marked it as the proper line?

A. Yes.

Q. Okay and you say these safety lines went in and went around here, an independent source of attachment to the building, is that correct?

A. Yes, sir.

Q. Now, where in this area were the men working with cleaning with powder or something that you testified to last Thursday?

A. Right where the ladder is and around the back side of the building where the door is.

Q. You said they were around the corner, around the back side of the building where the door is, but you said they were around the corner I think on Thursday, if I recall correctly, what corner are you talking about?

A They were on both sides of the corner right here, they only worked there a couple of hours if they worked that long.

Q. This position here?

A. Yes.

Q. What was the powder they were cleaning down, do you know?

A. No I don't.

Q. What did it look like?

A. White powder.

Q. Looked like something that had been spilled?

A. I don't know what it was.

Q. I see but these were plastering people?

A. Yah, I seen the guy before.

Q. Okay but he was with these people that usually worked on the inside of the building?

A. I don't know, they do plastering.

Q. Were they plastering anything?

A. Not that I could see.

Q. Do you know what they had been plastering?

A. No.

Q. YOu say they were there only a couple of hours, can you describe the person who was there? What did he look like?

A. That is all I know him by, Harry, he's got a big nose.

Q. He was a big fat, skinny guy?

A. Fat yah, big, about 250.

Q. And he was the only one?

A. Well they was about four of them, five.

Q. But all plastering people, people generally involved in plastering?

A. I'd say they were.

Q. Okay, so far as you know they didn't have anything to do with the masonry contractors that had been back there back in May?

A. Not that I know of.

Q. YOu say they were just cleaning for a couple of hours?

A. Yah, if it took that long, yes.

Q. Okay now, what did they do when they got done?

A. I don't know.

Q. Maybe, did they hose the place down?

A. Yes.

Q. They had a hose there?

A. Yes.

Q. Did they spray water all over the place?

A. All over the brick, yah.-

Q. Where they had been using acid or whatever they had been using?

A. Yes.

Q. So when they left, the place was cleaned up and washed down as far as you could tell?

A. that's all they did was --

Q. But so far as you could tell, they cleaned up and washed up before they left?

A. Yes.

Q. Okay now you can take your seat there.

Q. You described when a, was it Harold DONEY or DONNEY that brought the ropes by and the blocks by that morning, the morning of the accident?

A. (No response).

Q. Harold DONEY was the one who brought the ropes by?

A. Yes.

Q. Okay, he had them in the back of his pick-up truck I think you testified, brought them to the scene the morning of the accident, is that correct?

A. Yes.

Q. Okay now you also testified I believe on Thursday, that you took them out of the back of his truck and hooked one end on the bumper and then by grabbing on to the other end of the blocks you extended them prior to pulling them up the building, is that correct?

A. Yes.

Q. Okay now, can you see in this picture where you did that extending, that work of pulling the blocks apart?

A. No.

Q. Where was it in relation to that building?

A. This way further.

Q. Is there, this the front of the building we are looking at here?

A. Yes.

Q. Is there a roadway that goes right up by that building?

A. Yah, I believe it is a parking lot.

Q. Well, don't you have to go up a long, long hill to get to that building? Up from whatever route it is down the main road?

A. I don't remember.

Q. You don't recall that?

A. (Nodded)

Q. Wasn't this hospital site up on a hil?

A. Yah, sits up on a hill.

Q. And isn't it quite a steep hill that comes from St. Johnsbury?

A. I don't know. There's two ways in there, isn't there?

Q. I'm ask you if you recall?

A. I don't recall.

Q. Where do you do this extending of the ropes?

A. Right here in front, right out here.

Q. Further away from the building than shows in this picture, is that correct?

A. Yes.

Q. How far away from the building would you estimate, in feet?

A. 80 feet.

Q. Okay and you got them all extended and then what did you do?

A. (No response).

Q. Took one end and pulled it up?

A. Yes.

Q. Okay, was it a clear, dry day when you were there at the time?

A. Yes.

Q. So there's no way then that these ropes came in any contact with any acid or anything that morning, is that correct?

A. I believe not.

Q. Okay, now back on this safety lines, these safety lines are on either end of the staging as you were going up, were they not?

A. Yes.

Q. So in other words, those safety lines are approximately in the same position as they were when you were up on the staging itself, is that correct?

A. Yes.

Q. Now, You were standing, I think you testified on Thursday, facing the two ropes, the rope that you were working on and Mr. Mousseau was facing the rope in the other direction, is that correct?

A. Yes.

Q. From, okay now, from the picture, those safety lines were coming right down over head almost right by you, were they not?

A. Yes.

Q. Okay so were the safety lines between you and the rope you were working on?

A. It was fairly close, yes.

Q. Right there, in other words, you could have had it in your hands if you had wanted to, is that correct?

A. If I got out there and tied the rope off, yes.

Q. It was hanging right down by you where you could have had it in your arms at all times had you desired to, is that not correct?

A. Yes.

Q. How many jobs did you work on that summer or approximately where Mr. Doney was the foreman?

A. I still don't work for Harry.

Q. That's the only one, you didn't work with him for the rest of the summer?

A. Right.

Q. And so if he had had custody of that rope during that

summer you would have no idea where that rope had been is that right?

A. Right.

Q. You mentioned bringing the scaffold up empty or bringing the scaffold up to the roof line prior to the time that you got on it and I think you were talking about you couldn't get off the roof on to the scaffold because it didn't come up quite high enough, is that right, or stuck out too far?

A. Uh huh, it was too hard to get on to.

Q. Okay, was anybody on it at that time or did you bring it up empty?

A. Brought it up empty.

Q. The boys on the ground pulled it up?

A. Yes.

Q. So they just kept pulling on the ropes and pulled it up empty?

A. Yes.

Q. And then when you, both you and Mr. Mousseau were on top of the building at that time?

A. I was there by myself.

Q. I see, well how was Mr. Mousseau going to get on? Was he going to come up inside and get on?

A. He was going to see if he could get on because it would be a little easier than pulling up empty and then just pulling on the rope, it was too hard.

Q. So no materials or people were on it when it went up the

first time?

A. I believe we had our stuff that we were ready to use on there.

MR. BRYAN: You may inquire.

REDIRECT EXAMINATION BY MR. TYLER DECLINED.

THE COURT: Mr. Erdmann?

MR. ERDMANN: We have no questions.

MR. MILLER: We -

THE COURT: Mr. Affolter?

MR. AFFOLTER: Yes, Your Honor, we have a few questions on recross.

RECROSS EXAMINATION BY MR. AFFOLTER:

Q. Mr. Martin, you described for us the other day a method whereby you passed your hand under the scaffolding with a rope in it and after you got up to the top?

A. Yes.

Q. Would you describe exactly how that worked again?

A. Well, once you got up there, you just held, put the rope around the back side and reached underneath then just give the rope a flip and then put it over the hook, then you hang on to your loose rope and let this one go and it binds your ropes together. Pulls you on and then you put another hitch on, just to make sure.

Q. You have to put your hands underneath the board or the scaffolding material to do that?

A. No.

Q. That's to the side of them, around the ropes, is that what

A. (No response)

Q. And around the little metal piece that comes up from the edge of the scaffold to fix the roof to?

A. (No response).

Q. You're saying you put your hands around something. What do you put your hands around?

A. You put your hand around your, you've got the rope in your hand. The rope is hanging straight down on the other side of you. You just reach underneath. It's like a "V", when you grab the rope you just twist it. When the wheel, when you put it over the hook it just binds itself into that "V".

Q. At that time, were you the only one holding on to the rope on that side?

A. Yes, sir.

Q. And Marvin was he the only one that was holding on to the rope on the other side?

A. I believe so.

Q. Did the two of you lift yourselves, provide the power to lift yourselves at that point?

A. No.

Q. But at some point, you took over the ropes and the fellow down below let go?

A. Yes, sir, I had a couple of feet to go.

Q. Oh, okay why was that? Why you, why would you let go then?

A. Because you can handle it better yourself after you get it to a certain point.

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Q. What would happen if one of you would let go of it accidentally, tripped, or for whatever reason, let go of a rope, at that point?

A. I would say you would fall.

Q. One side of it at least would fall?

A. One side of it, yes.

Q. What would happen if the other fellows, while they were pulling you up this scaffold, what if one of them tripped or dropped the rope for some reason? Same thing?

A. No, it wouldn't fall, not if you were hanging on it.

Q. If you hang on to it at the same time, you mean?

A. Yes.

Q. How about while pulling you up?

A. You wouldn't fall, not if youre hanging on.

Q. No I'm talking about when the two fellows down below were pulling you up?

A. If one of them just happened to stop?

Q. Well, what if one of them just let go for one reason or another?

A. That's not that much pressure on you.

Q. What do you mean, not that much pressure?

A. Well, you're only pulling maybe about 50, 60 pounds.

Q. No, but what if one of the tripped and fell or for whatever reason you got stung in the nose by a hornet and reached and let go of the rope?

A. nothing happened.

Q. Why wouldn't the scaffold -

A. See there's a little, you'd feel a little strain, that's all.

Q. Well, why wouldn't the scaffold fall? What would keep it from falling if you let go of it? - If you let go of the rope as they were lifting you up?

A. Because you're hanging on.

Q. Okay, so what I'm saying you're hanging on also at the same time?

A. Yes.

Q. Once they let go, you're the only one that's hanging on?

A. Right

Q. If anything happens, one of you let go of either side while you're going up, the scaffold will fall?

A. Yes.

Q. And therefore, - is there more motion, more chance of falling, in your mind, in going up on the scaffold than there is once you get secured and once you get it tied off?

A. Well, after you get up there, you have more chance of falling.

Q. Well, is the going up process a little more dangerous than - that one would prefer to step on from the roof or is that just to make it shorter?

A. That's just to make it shorter.

Q. In any event, you elected not to use the safety lines, either going up or once you got up?

A. Once we get up there I used them.

Q. You used them to walk back and forth on the scaffold?

A. Yes.

Q. To steady yourself, but not to affix to yourself? Not as a lifeline, in other words?

A. Right, if you get pitching away when you're trying to work.

Q. Did you ever mention in your deposition or any of the statements that you have given, have you ever mentioned this - the fact that you raised the scaffold once before putting it back down to the ground?

A. (No response).

Q. Did you ever make any reference to that before this trial?

A. I don't know.

Q. If I were to say that you did not make any mention of it in your deposition or a couple of statments which you gave within a few weeks after the accident, would that be correct?

A. I don't recall saying anything about it.

Q. Did you think there was anything important about the fact that you had raised the scaffold once and then moved it back down?

A. No.

Q. Are you aware at the time that you were on the project from the time the rope arrived until the accident occurred, of the rope ever being subjected to acid or to a burning of any sort to an extreme heat sources,

such as it would singe you to burn in this way?

A. No.

Q. As far as you know, on the project itself, You're not aware of any such occurrence?

A. Right.

MR. AFFOLTER: That is all I have.

RECROSS EXAMINATION BY MR. MILLER:

Q. Mr. Martin, I believe you told us that you painted the lower portions of the building with this pre-coat using a Baker's scaffold and then hooked up the aluminum bed and the two point swing suspension scaffold just before the accident happened?

A. Yes.

Q. How long does it take for the lower portions to dry after you put the pre-coat on?

A. Gee, I don't have any idea.

Q. Was it dry when you went to use the scaffolding that fell down at the time of the accident?

A. Well now we started at a different part of the building doing the high work than we did on the bottom.

Q. So the work that you did on the bottom, was not under where the scaffolding was hanging?

A. Right.

Q. Was there some other portion of the building?

A. Yes, sir.

Q. What other portion of the building?

A. The _____ that swings left.

Q. All right, is the building that's shown on the blackboard where would it be? Over here?

A. Way over.

Q. Around the corner?

A. Way over that way. See, that was the high part of the building, then they had the lower part the other way.

Q. Farther down this way?

A. Yes.

Q. All right now, calling your attention again to the testimony that you gave about these men putting acid, cleaning the building at the same time, if I am correct, you say that they were over here and over here, is that correct?

A. Right.

Q. All right, how many men were there?

A. I would say four or five.

Q. Four or five? What work were you doing at this time?

A. Me and Marvin were just seeing how to ride it up.

Q. Outside the building were you?

A. Yes.

Q. For how long a time were you actually able to see these men?

A. 10, 15 minutes.

Q. All right now, when in point of time, having in mind that the accident was on September 30th, do you claim that these men were working with the accident as you have testified?

A. I believe it would have to be around 10:30 or 11:00 o'clock on Tuesday.

Q. All right; was Tuesday the day before the accident?

A. No.

Q. It was how many days before the accident?

A. Two.

Q. Two days before the accident?

A. (Nodded).

Q. And then you say when they got finished, they washed down the building; you saw them do that?

A. Yes.

Q. All right now. How high up on the building were these men cleaning the building, as you testified?

A. To the first layer of concrete.

Q. Does that show in one of the photographs?

A. Yes.

Q. May I have Defendant's "D" please? I show you Defendant's Exhibit "D" and are there two layers of concrete that divide the brick wall?

A. Yes.

Q. And you say they were cleaning up to the first level of concrete?

A. Well, they had a little bit in here, but this -

Q. A little bit above the first concrete?

A. Not very much.

Q. How high in terms of feet, is that first concrete band?

A. 15, -

Q. 15?

A. 15 - 18 feet.

Q. 15 to 18 feet, there was some you say a little over the top of that?

A. Yes.

Q. And you say there were four or five men doing this?

A. Yes.

Q. What color uniforms did they have?

A. I don't believe they had any.

Q. What were they dressed as?

A. Workers.

Q. Did they have a truck that they went to for supplies?

A. I didn't see any.

Q. Where did the water pails, the water hose get its water from? Where was that connected to?

A. I don't know.

Q. Was it a one inch hose or larger?

A. Looked like a three-quarter inch or an inch, somewhere around in there.

Q. What color was the hose?

A. Black.

Q. All right you say that was two days before the accident?

A. Yes, sir.

Q. All right now on the day of the accident those portions upon which the men had been working two days before, were all dry by then, is that correct?

A. I believe so.

Q. And in your testimony I believe you just testified to Mr. Affolter as far as you know you can't find any reason that that rope get any acid on it on the date of the accident?

A. My -

Q. As far as you know?

A. Right - right.

Q. Now a, I believe you testified the other day that the week before this accident you painted a steeple at Dannemora, New York?

A. I believe it was the week before that, yes.

Q. All right, you said the steeple, if my recollection was correct, was about 75 to 80 feet high?

A. Yes.

Q. How were you suspended 75 or 80 feet in order to paint that steeple?

A. About like - well, Boatswain's chair.

Q. I'm sorry.

A. Like a swing seat.

Q. Does that mean a little platform you sit on?

A. Yes.

Q. It has a rope that holds it up?

A. Well yes, it has one rope but you have a pulley the same way as when you use here, you only have one.

Q. All right you pull the rope and, on the pulley, and it pulls you up or lets you down, whatever you want to do, is that right?

A. Yes.

Q. What was the size of the rope on the Boatswain's chair?

A. Three-quarter inch.

Q. Just like the one on this job?

A. Yes.

Q. All right now tell the Jury if you would, what precautions you took in the event that that rope that was holding you 75 to 80 feet in the air should fail?

A. None.

Q. Was that your usual habit to use a Boatswain's chair just rely on that one rope alone?

A. Yes.

Q. All right now, how about when you painted those grain elevators for AGWAY in St. Albans? I believe you told the Jury you were a hundred feet in the air clear to the top of these grain elevators, how were you suspended in order to be that high off the ground?

A. The same way.

Q. With a Boatswain's chair?

A. No, with a swinging staging.

Q. Swinging staging just like the staging that was used on the hospital?

A. Yes.

Q. All right now tell the Jury what precautions youtook for your own safety in the event that something should happen to that swing staging while you were a hundred feet in the air?

A. We hook our safety lines same as we do onthis job.
Q. And did you tie those safety lines around you?
A. No.
Q. You just let them hang next to the building?
A. Yes.
Q. So that meant that if anything should happen to that swing staging, the only thing that would save you from serious injury or from perhaps your death, would be being able to grab on to one of those lines, is that fair?
A. If you are already up there you tie yourself off, you hang on that rope.
Q. Did you tie yourself off when you got up there?
A. Yes.
Q. YOu did tie yourself off in St. Albans?
A. Yes.
Q . In other words you tied that safety line around your body?
A. No.
Q. What you tied off was the rope on the staging, is that right?
A. right.
Q. All right now I say supposing something should happen to that staging either the rope breaks or the boards that are holding it on the top give way, the only chance you had to avoid very serious injury or even your death, would be to grab hold and try to catch the lifeline before you fell out of that chair, is that

fair?

A. You already had your hand on it when you tie yourself off, the first thing you do is grab that rope.

Q. All right then you hold that rope all the time, do you?

A. Yes.

Q. Every time you go along that stage you never let go of that rope, is that right?

A. Yes.

Q. Why do you hold the rope?

A. Helps to steady yourself, the swing going back and forth.

Q. All right and why do you hold it? You hold it because that is the only means you have to protect yourself from serious injury or even death, is that right?

A. Yes and to steady yourself.

Q. And you knew that at the time?

A. Yah, I know that.

Q. And you knew that at the time of this accident that the only thing that could save you from serious injury or even death would be to hold on to that life line?

A. Yes.

Q. And if you had that lifeline tied around you, even if you let go of it with your hand, it would still hold your body, is that right?

A. Yes.

Q. Now did you receive workmens compensation when, benefits, when, - for the injuries that you sustained in the

accident at the St. Johnsbury Hospital?

A. Yes.

MR. MILLER: NO further questions.

MR. BRYAN: Nothing further, Your Honor.

THE COURT: That is all I believe, Mr. Martin.

MR. TYLER: I have some, Your Honor.

THE COURT: I'm sorry.

REDIRECT EXAMINATION BY MR. TYLER:

Q. That workmens compensation that you received was from New York State?

A. Yes.

MR. TYLER: I have no further questions.

Mr. ERDMANN: I have some, Your Honor.

RECROSS EXAMINATION BY MR. ERDMANN:

Q. Mr. Martin, I understand now that when you fellows are working on these scaffolds a hundred feet high, you hold on a lifeline with one hand and paint or do whatever else you are doing with the other hand, is that the normal way?

A. Yes.

Q. You walk back and forth on the stage like this, with one hand, right?

A. Yes.

Q. That is the way you conduct yourself whenever you are up on top of that staging, is that true?

A. Yes.

Q. Why is that that you do it that way?

A. It is easier.

Q. It is easy to hold on with a lifeline and paint back and forth walking on a swinging staging is that right?

A. Yes, sir.

Q. These stages some times sway in the wind?

A. Yes.

Q. Do you some times have to bend over and pick up a paint bucket?

A. Not that often, you walk back and forth just drop the rope in.

Q. Some times you have to do that don't you?

A. Very seldom.

Q. Some times you have to pour the paint out of the bucket and use the roller pan don't you?

Q. A. (No.

Q. You don't have to do that?

A. No.

Q. How do you operate that?

A. Use a five-gallon pail.

Q. In other words you take a big pail up with a pan and pour?

A. No pan.

Q. You put the roller directly into the pail?

A. Yes.

Q. I see, you walk back and forth like that all day long?

A. Yes.

Q. That may be a foolish question but I have just got to ask you why didn't you just take that rope that you are hold-

ing on and tie it around your waist?

A. Because you trip on it.

Q. Now sir, if the rope is hanging from the rope, from the roof, you can tie it right down around your "strap" and back up, can't you?

A. Where's the excess going?

Q. I don't know, but you can do it that way, can't you, wrap it several times around your waist?

A. If you wanted to do it that way.

Q. No, but wouldn't that be better than to work all day long with one hand hanging on to the rope and the other painting, that doesn't make sense does it, really?

A. By hanging on, it does to me.

Q. Wouldn't a better procedure be to use a belt?

A. I have never seen anybody use one.

Q. You have never seen a safety belt in five years on scaffold work?

A. I have seen one, sure, you have plenty of times, but never on a scaffold.

Q. Johnson Brothers, your bosses have those belts?

A. I've never seen them use it either.

Q. They have the belts, don't they?

A. Yes.

Q. And all you have to do is run the safety line through the the belt, tie it or clip it, then you can use both hands all day in complete safety, isn't that true?

A. I work fast enough with one I don't need two.

Q. I see.

MR. ERDMANN: that is all I have, Your Honor.

MR. AFFOLTER: Nothing further.

MR. MILLER: Nothing further, Your Honor.

MR. TYLER: No further questions.

THE COURT: That is all, Mr. Martin.

* * *

HAROLD EDWARD DONEY, having been called as a witness by the Plaintiff, through his deposition which was read as follows:

DIRECT EXAMINATION BY MR. TYLER:

Q. Mr. Doney, would you tell us your full name, please?

A. Harold Edward Doney.

Q. And where do you live, Mr. Doney?

A. Northfield, Falls.

THE COURT: What was the date of this deposition?

MR. TYLER: The date of the deposition is February 18, 1974.

Q. I guess I said, that is in Vermont?

A. Yes.

Q. And how long have you lived there?

A. All my life.

Q. By whom are you employed?

A. Johnson Industrial Painting Contractors.

Q. Contractors?

A. Yes.

Q. And their principal office is where?

A. Plattsburg, New York.

Q. Who is the principal of that firm? Who is the person who owns it?

A. Jack Johnson.

Q. He is the chief cheese?

A. He is the chief.

Q. How long have you worked for them?

A. I think it's eight years.

Q. Steadily? That has been your only employment for 8 years?

A. Yes, I believe it is right around there somewhere.

Q. Were you employed by them in September, 1971?

A. Oh, yes.

Q. Now, referring back to September 30, 1971, what was your position with the Johnson firm at that time?

A. I was foreman of the painting contractors for him.

Q. Foreman of the painting contractors?

A. Just the foreman for him.

Q. Would they have many foremen?

A. Yes, probably six at that time, maybe a little more. Somewheres around there.

Q. There would be a foreman for each job that they would have, for the most part?

A. Yes.

Q. And what job was Johnson engaging in that you were foreman of at that time?

A. At the time of the accident, that job there?

Q. Yes.

A. I think Eastern Regional Hospital in St. Johnsbury.

Q. Was Johnson a sub-contractor for that job?

A. Yes.

Q. Do you happen to remember who the contractor was?

A. Vermont Construction.

Q. Vermont Construction Company?

A. Yes.

Q. Now, what sort of work was the Johnson Industrial Painting Contractors doing? What sort of work were they doing?

A. Painting. You mean inside and out?

Q. Yes, in connection with this job, what part of it did Johnson have to do?

A. Interior and exterior painting.

Q. This includes water-proofing cement?

A. You mean cement as far as the Precoat they were using?

Q. this was something you put onto the cement before it was painted?

A. It don't get painted.

Q. It doesn't get painted?

A. No.

Q. this is in place of a paint, on top of cement?

A. Yes, right.

Q. Now, was this the substance that you were to put on to the building at the time of the accident?

A. Yes.

Q. And you call it PRECO, or PRECOAT?

A. PRECO.

Q. That is a trade name?

A. Yes.

Q. What sort of stuff is it?

A. Well, it would be similar to a cement finish, only more or less of a sand finish type, instead of a smooth, glossy surface.

Q. What is its function?

A. Just for the looks or what, I don't know.

Q. It has color to it?

A. Yes.

Q. A grayish color?

A. this happened to be sort of a gray. I presume you can get it in any color, this happened to be a gray.

Q. Did it help to preserve the cement, or is that necessary?

A. I do not think it is necessary, but you could, possibly.

Q. Is it caustic material or acid?

A. No, just mix it with a milk. Has a milky form, stuff comes with it.

Q. It isn't the sort of stuff you would have to keep off you, with the danger of burning you?

A. Oh, no.

Q. If you get it on your hands, it would be no problem?

A. No.

Q. Or clothing, no problem more than paint would be?

A. No.

Q. Now, you remember how long Johnson had been on this particular job at the time of the accident?

A. Probably. I don't know. I would say somewhere near four months.

Q. On that particular job?

A. Yes. I don't know. It might have been longer than that. I don't know. It mgith have been somewhere around there. I don't know when we did start.

Q. Could have been shorter, could have been longer?

A. Yes.

Q. Now, how high was this building that was having PRECO applied on it at the time of the accident?

A. I would say right around forty feet.

Q. Might be higher, might be lower?

A. Not much. Yes.

Q. And what sort of a rig did you use in order to apply this

substance to the upper portions of the building?

A. Well, we had aluminum, twenty-one foot aluminum bed, the bracket and the bed sits on two tackle blocks, four by four outriggers, coming out the top of the roof. We had been on the roof with sandbags and blocks and cable on the roof to first hook into the outriggers.

Q. And this arrangement was suspended by rope?

A. Yes.

Q. What type of rope?

A. The name of the rope?

Q. No, what type. Was it a manila rope?

A. Yes, I guess so, yes.

Q. It wasn't a nylon or a synthetic fiber rope?

A. No.

Q. And the thickness of the rope was what?

A. Three quarters of an inch.

Q. How much rope was there all together?

A. 600 feet.

Q. Now, I take it then, that by a bed, you mean a platform in which the man would stand?

A. Yes.

Q. And this is made of aluminum?

A. Yes.

Q. With some strenthening elements, possibly of sttel or iron in it?

A. No, I think it was all aluminum.

Q. Any idea how heavy it would be?

A. Oh, 50, 75 pounds.

Q. Could two men lift it easily?

A. Oh, yes.

Q. And would this bed have something on it that would prevent people from falling off it?

A. Yes.

Q. And what was that?

A. Two by four along the back of the bed, about belt high, waist high, probably.

Q. Now, what keeps the structure from banging into the wall?

A. We have wheels that come up the side of the building that goes off the bed. The bed is like this here. The wheel comes off like this and holds this on, the wheel, if you wanted a foot away or two feet, this wheel just reaches down to keep your staging and stuff away from the building.

Q. If you wanted it a foot or two from the building you can just adjust the wheels to swing out that?

A. Right.

Q. But the wheels don't come in any brackets, they are just against the face of the building?

A. Yes, right.

Q. And the weight of the bed and the weight of the men on it serves to keep the wheels in contact with the building?

A. Yes.

Q. Now, attached to each side of this bed, the top parts of it, I take it there were two snatch blocks, a block or

tackle on either side of the bed?

A. A snatch block. What do you mean by a snatch block? Those are the ones that open and close for the ropes to go in?

Q. Actually, I should be asking you. I will rephrase the question. Could you describe in a little more detail what sort of pulley arrangement was used in order to raise and lower this bed and where each of the pulleys were?

A. The double tackle block, two weels on each pulley on to the top and the other hitched to the bed.

Q. Would that be for either side?

A. Would be two on each side.

Q. Altogether there were four?

A. Right.

Q. And one of these, two of these blocks, would have been attached by a metal hook or some such thing to the bed?

A. Yes.

Q. And two of the blocks were to have similarly been attached in some fashion to the four by four's protruding from the roof, is that correct?

A. Yes.

Q. And then you say it was a double block, so rope would go from the pulley at the top, down through the pulley on the bottom, back up through the pulley on the top, back down?

A. Back down and go back up.

Q. And back up and then back down again, is that right? Now, I believe you said there was 600 feet of rope. Was this all together, 600 feet?

A. Yes.

Q. So that this rope was what, - had been divided into two pieces?

A. When I got it home I cut it in two, 300 feet, right in the middle.

Q. So you had at the job, two, 300 feet lengths of rope, is that correct?

A. Yes.

Q. Now, what was attached to the end of the rope that was attached to the pulley, or the block up on the roof?

A. How was the rope attached to the pulley?

Q. Yes.

A. A - two of the hooks came down like this, with a pulley on the center with a wheel on it and we had them braided to the part that the two eye beams, things that come down through the center.

Q. Was the end of the rope, was there a loop braided on to it?

A. Yes.

Q. And this was to sit on to the pulley at the top, or is attached to the pulley at the top?

A. Right, yes.

Q. Now, referring back again to September 30, 1970, was this staging, the pulley as you have described it, was that put up that day?

A. No, I believe we put it up the day before.

Q. Now, do you remember what time of day on the 30th that the accident occurred?

A. I believe it was somewheres around 11:00 o'clock.

Q. In the morning?

A. I believe so.

Q. So what time would you have started working that morning?

A. 7:30.

Q. And what would you have done between 7:30 and 11:00 o'clock?

A. I don't remember what they were doing at that particular time.

Q. Might you have been completing putting up the staging?

A. No, I think that was all up the night before. It could have been inside work for a while and we had to mix the stuff up and match it up so we could use it. I don't know if we did a little of the low stuff first to see how it was going to work. I think we did and then went on to the staging.

Q. Were you there when the ropes and staging were put up?

A. Yes.

Q. And you brought the rope that was used for this purpose?

A. Yes.

Q. And you brought the blocks or the tackle that was used for this purpose?

A. Yes.

Q. So thatyou know that the rope that you brought was the same rope that was involved in the fatal accident?

A. Yes.

Q. Was the bed of the rig tested before the men went up on it, to your knowledge?

A. What do you mean by "testing"? Well, you pull it up a ways and jump on it, like you always do, if that is what you mean.

Q. Were you present when that was tested?

A. Yes.

Q. Can you describe it?

A. You pull it up say 4 or 5 feet, just jump up and down on the bed a few times.

Q. Did anything unusual happen when this testing was done?

A. No.

Q. Now, were you present when the accident occurred?

A. No.

Q. Do you have some recollection of how long before the accident occurred that you left?

A. I wouldn't say it would be much more than, maybe half, three-quarters of an hour, maybe.

q. It might have been sooner than that?

A. Might have been sooner. Might have been a little longer. I don't know exactly what time it was.

Q. Where did you go when you left?

A. I went to another job that we had at Union 32 in East Montpelier.

Q. Were you there when you heard the accident had occurred?

A. Yes.

Q. You went back to the site?

A. Yes.

Q. Now, when you left,the rope and staging was all up, I take it?

A. Yes.

Q. But the men had not started work yet on the staging, as far as you recollect?

A. I do not believe they had. Maybe they were just starting up. I really don't remember for sure.

Q. When you came back, this rope and the staging and everything was still there?

A. Yes.

Q. Did you take any of this rope into your possession?

A. Yes.

Q. Could you tell me at this point, how many pieces of rope there were?

A. Four.

Q. And can you describe roughly what length they were?

A. The one on the right side of the building would have been, I presume, - well, shouldn't say right, one side or the other, there was one rope about 18 feet long, the other was about 20, maybe 21 feet long.

Q. These are approximate measurements as you recollect them at this time?

A. Yes, I don't know for sure. Somewheres around there. One was 3 or 4 feet shorter than the other, something like that.

Q. And each of these pieces of rope had come off one of the 300 feet lengths?

A. Yes.

Q. So that, in effect, you also had two pieces of rope that were close to 300 feet long?

A. Yes.

Q. Did you take all these pieces of rope in to your possession?

A. I have three.

Q. Which of the three?

A. The two long pieces and one short piece.

Q. What happened, if you know, to the other short piece?

A. I gave that to Martin to bring back to Mr. Johnson.

Q. Mr. Johnson was your employer?

A. Yes.

Q. And you have seen all these ropes since, have you not?

A. Yes.

Q. Mr. Doney, I show you a rather mangled piece of rope with a tag on it, entitled Plaintiff's #1 for identification. Is this the piece of rope that you gave to Martin to take home to Mr. Johnson?

A. Yes.

THE COURT: Was that Martin or Johnson?

MR. TYLER: That you gave to Martin to take home to Mr. Johnson.

THE COURT: Thank you.

Q. Who put the braid in it that appears at the end youare holding?

A. Donald Underhill.

Q. Who is Donald Underhill?

A. He is an employee of Johnson Painting.

Q. He did this at your request?

A. Yes.

Q. And was the tab put on,that appears at that end at that time?

A. I believe it was, but I couldn't say for sure if it was.

MR. TYLER: May the record show, Your Honor, Plaintiff's #1 for identification is also 17-A?

THE COURT: Yes.

A. We might have done it at the job.

Q. When was the braiding done?

A. That was done the same day I got the rope.

Q. Into two, 300 feet pieces?

A. Yes.

Q. Do you remember when this was?

A. I believe it was May.

Q. Of what year?

A. '71.

Q. Now, the loop that has been briaded on to that rope, this was what was to fit on to the block and tackle up on the roof?

A. Yes.

Q. So that this rope reduces one end of the 300 foot piece is that correct?

A. Yes.

Q. The end of this piece of rope at the opposite end from where the loop is, has a piece of tape, what looks like electrician's tape around it, is that correct?

A. Yes.

Q. And what would that spot mark?

A. I don't know. Probably Jack must have put it on over there.

Q. By "Jack" you mean Mr. Johnson?

A. Yes.

Q. But the end away from the braided loop, is that where the rope broke?

A. Yes.

Q. And that is where the rope broke at the site of the accident, is that correct?

A. Yes.

Q. Now, approximately 2 or 3 feet from the braided end, many of the strands of the rope have been broken and only a few are left. Was the rope, - did that tearing or breaking appear when this rope was given to the Martins to take to Mr. Johnson?

A. No.

Q. Do you know how come that rope appears in that fashion now?

A. I believe they had it tested.

Q. Now, on certain portions of that rope one can see some darkish discolorations. Did those appear as of the time you gave the rope to the Johnsons, as you recollect?

A. I really don't know.

Q. You do not remember whether there were any dark marks on it at that time or not?

A. No.

Q. Now, who was present, as an employee for Mr. Johnson at the time of the accident?

A. Mucker Martin, Sam Martin and Chip Martin.

Q. These Martins are all related?

A. Yes.

Q. One of them is a father and the others are two sons?

A. Yes.

Q. Have they worked as a family for Mr. Johnson for quite some time, is it your understanding, or do you know?

A. Yes.

Q. And the fourth person that was present, was whom?

A. Marin.

Q. He is the man that was killed?

A. Yes.

Q. Now, aside from the weight of the bed that you have mentioned, and the weight of the rope itself, what other items of weight would have been on that bed at the time of the accident?

A. The two men, the two paint brushes and two-gallon pails.

Q. And the gallon pails were not terribly heavy, I take it, any more than two gallon paint cans would be?

A. A little heavier than paint would be.

Q. But approximately the same thing?

A. Yes.

Q. How heavy would you say the two men were?

A. I would say Mucker is probably 195, 200 and Marvin was probably 175.

Q. And so the items that you have mentioned so far, the rope, the bed, the paint and the men, would have been all the weight that would have been suspended from that rope, is that correct?

A. Well, we have, - you know, the two ropes that go down to hold the bed from the block to the bed, that might have weighed 15 pounds, maybe 20 pounds.

Q. All together?

A. Yes.

Q. And you said you thought the bed itself weighed around 75 pounds?

A. I would say right around there, yes.

Q. So you are taking the wieght of the men and the paint and everything else together. Would you appear to be saying it wasn't much more than 500 pounds weight on that, suspended from the rope?

A. No, I wouldn't say so.

Q. Now, who bought this rope on behalf of Johnson?

A. I did.

Q. From whom did you buy it?

A. Reynolds and Sons of Barre.

Q. Now, Mr. Doney, here is a sheet of paper entitled Plaintiff's #2 for identification, which states it is an invoice from Reynolds and Sons, Inc., of Barre. Is

this the invoice involved when you bought that rope?

A. Yes.

Q. And at the same time that you bought the rope you bought some other items, did you not?

A. Yes.

Q. And what were they?

A. Tackle blocks.

Q. Were these the same tackle blocks that were in use at the time of the accident?

A. Yes.

Q. And the date of that invoice is what?

A. May 12th.

Q. Of what year?

A. '71.

Q. And is that the date that you actually purchased these items from Reynolds and Sons, to the best of your recollection?

A. Yes.

Q. You would say you bought these items at least in the month of May?

A. Yes.

Q. 1971, and these invoices, at your direction, was billed to whom?

A. Johnson Painting Contractors.

Q. Do you remember the individual from whom you purchased those items?

A. No, I do not.

Q. Do you remember where the rope was actually located in the store when you got it?

A. I believe it was upstairs. I am pretty sure he went upstairs to get it, or in the back room. One or the other. I was upstairs. I don't know for sure if he went upstairs or not, but I think he did.

Q. Did you accompany him when he went to get the rope, or wait for him to bring it out?

A. I waited.

Q. Did you request that this be three-quarter inch rope?

A. Yes.

Q. From your experience in the trade, do you have some knowledge as to what the breaking strength of three-quarters inch manila rope is supposed to be?

A. No.

Q. How did you happen to pick three-quarter inch rope?

A. I believe when I was talking with Jack he said to buy the three-quarter inch rope.

Q. Was there any discussion that you remember with the person at REYNOLDS when you bought the rope, as to what you were going to use it for?

A. Yes.

Q. What did you say you were going to use it for?

A. Swinging staging.

Q. Did the person there apparently know what you were talking about?

A. Yes, because the first set of tackle blocks that he

brought out to use we couldn't use them. They had all together, ring hooks, hooked up from the rear, so then he went and got the other blocks.

Q. Did you tell him how high you would be working?

A. No, I dont' believe so.

Q. How did you arrive at the need for 600 feet of rope?

A. Let's see, I don't know, unless the building was only forty feet, but if we go to another building which might be sixty feet, which might be eighty, as long as we are going to buy the rope, you might as well buy enough so that you have enough rope.

Q. From what you said before, if the building was 50 feet high you would have to have 200 and 50 feet of rope, wouldn't you? Around twice and back down to the ground?

A. Yes.

Q. So you didn't have a great deal of excess rope for your building?

A. No, I don't know, maybe they might have had their 400 feet and they jumped to 600. I do not really remember how we came to the 600.

Q. In any event, the man you dealt with knew it was to be used for staging?

A. Yes.

Q. For some height, but he wouldn't, in your opinion, have any reason to know how high?

A. No, I don't believe so.

Q. Nothing you told him would have led him to that conclusion?

A. I don't believe so, no.

Q. Does REYNOLDS AND SONS have a basement also, where they store, or do you know?

A. I don't know.

Q. Now, was this rope used for any jobs between the time you purchased it and the date of the accident?

A. NO.

Q. Where was the rope during this period of time?

A. At my house.

Q. Where, in your house?

A. Barn, the attic , upstairs.

Q. Of your house?

A. Yes.

Q. Was it rained on or anything during this period of time?

A. No.

Q. So it was in your possession and control during this entire period from May until September 30th?

A. Yes.

Q. Did you take the rope out with you on any occasion?

A. Yes, I took it to one job at Union 32 and we didn't use it. We used the cables instead and I just took it right back home.

Q. And any other job you can recollect?

A. No.

Q. Was it left out at any time?

A. No, well, it was left out the night, down on the building, over-night at St. Johnsbury.

Q. It was the same rope when you came back the next morning, I take it?

A. Yes.

Q. Is it customary to use manila rope in the trade for this sort of swinging staging?

A. Yes.

Q. Done it before?

A. No, I haven't, but I am sure Jack has. I myself, always use the cables.

Q. Your knowledge of the trade, manila rope is used for this sort of staging work at heights?

A. Yes.

Q. Now you say you don't remember having used rope at other times on staging?

A. No, Marvin and those guys used it all the time, though.

Q. Would you say that the rope looked to your eye, more or less the same when you figured it out to be used on the St. Johnsbury building as it had when you bought it?

A. Yes.

Q. To your knowledge during any of this period of time from the time you bought the rope until the time of the accident, was the rope subjected to anything acid or caustic, or anything that owuld have burned it or deteriorated it in your opinion?

A. No.

Q. Now, I believe you said before that this particular brand of rope, piece of rope, Plaintiff's #1 for identification,

went to the Martins and then to Mr. Johnson and is the rope that you see today. Now, what happened to the other short piece?

A. I took it and gave it to the Labor Board in Montpelier.

Q. As far as you know they still have it?

A. Yes, they do have it.

Q. And I think you said that you kept the two long pieces, is that correct?

A. Yes.

Q. And where did you keep them?

A. I took them after the accident, I had them up in my brother-in-law's barn.

Q. Was this a sheltered place?

A. It is not, really. They call it a barn, but it is up over his garage. They call it a barn. There is no cattle or nothing. There is a garage with an upstairs on it. It was upstairs.

Q. Dry up there?

A. Yes.

Q. Do you remember how long it remained there, stayed out there?

A. I belie it was there until I gave it to that fellow there from New York.

Q. Mr. KANUFFKE, the investigator?

A. Yes.

Q. This would have been perhaps a year ago, last Spring?

A. Yes.

Q. And would March 21, 1973 sound like an approximate date?

A. Yes.

Q. Then you turned the rope over to him and it was the same rope that had been on the scene of the accident?

A. Yes.

Q. And it was, as far as you could tell, in approximately the same condition?

A. Yes.

Q. When you removed it from the barn where it had been stored, it was in your opinion, the same rope and looked in the same condition as when you first put it there?

A. Yes.

Q. Did you keep possession of the blocks, the tackle after the accident?

A. Yes.

Q. And where did you store those?

A. The same place.

Q. Were they used again?

A. No, I don't believe we used them again.

Q. Do you know who has possession of those now?

A. I presume it would be Dick JOHNSON, or Jack JOHNSON.

Q. Dick JOHNSON Is somer relation to Jack JOHNSON?

A. Yes, brother-in-law.

Q. You know you turned them over to them?

A. I know I gave them to Dick. Whether Dick gave them to Jack at a later date, ...

Q. How about the bed?

A. The bed Dick hat, too.

Q. And was that used again, as far as you know?

A. Yes.

Q. It was used?

A. Yes.

MR. TYLER: I don't think I have any further questions.

CROSS EXAMINATION BY MR. AFFOLTER:

Q. Mr. Doney, you have talked about the condition of the rope at various times. In view of what has happened do you think you can tell what the condition of the rope is, just by looking at it at any given time?

A. No, probably not.

Q. I assume you made the assumption that the rope was perfectly tolerable and was put out on the St. Johnsbury project?

A. Yes.

Q. Did you make any attempt to examine the rope carefully for any reason than you normally would?

A. No.

Q. So that when you indicate that at subsequent times after you took it away from storage in the barn, as you call it, or the garage and when it went on to the project, to the way it looks now, do I understand you correctly, what you - are saying is that you don't observe any difference in the condition aT THESE VARious times?

A. As I say, these black marks I do not remember if they were on it or not.

Q. Do they ring a bell with you? Have you seen those marks on ropes before? Any idea how they got there?

A. I did not see them until the fellow came on Saturday with the pictures and he pointed them out then.

Q. When was that?

A. Saturday.

Q. This last Saturday you are talking about?

A. Yes.

Q. What happened then?

A. FITZPATRICK came with the pictures Friday night and called me back Saturday morning. He has all the pictures of the accident and he had a picture there and that is when he happened to notice them under the magnifying glass.

Q. Who is this party?

A. I believe he is the representative for the rope company.

Q. That was this Saturday and he showed you some pictures?

A. Friday night and called me back Saturday morning.

Q. What did he want you to do, compare the way the pictures looked to the way the rope was now?

A. No, he had pictures like it is right there. The scaffold still hanging off the building and this end of the rope isn't quite through the blocks and the other end, that is hanging, the two-by-four that busted and the rope?

A. No.

Q. You talked about a busted two-by-four, broken two-by-four.

Where would that have been? - The two-by-four that you are talking about?

A. Right.

Q. That snapped?

A. Came right down, this end let down first and then it broke, I presume.

Q. How about the blocks, do you know? - And any of the other equipment associated with the scaffolding, was there anything else destroyed or broken that you observed?

A. Well, I mean like the paint bucket would have been, - that, - you know, splattered over the process.

Q. How about the outriggers as you call them? Were they undisturbed?

A. No, I believe one rigger was busted. You are talking about the outriggers that come off the roof?

Q. Right.

A. No, nothing. They were upright. What was busted was a wheel that went against a building.

Q. Was there a single wheel or double wheel? One on each end of the bed?

A. One on each end of the bed.

Q. Did you observe anything else abnormal or unusual after you got there?

A. No.

Q. Well, everything that was broken, I take it, was something attached to the bed itself?

A. Well, the only thing that was busted was the two-by-four.

Of course the rope, but the two-by-four was the only thing there, other than the buckets.

Q. Do I understand you correctly from our conversation thus far, from the fact there was four ropes and two smaller pieces, both ropes broke, one on each side?

A. Yes.

Q. When I say "broke" that is obviously something you assumed from talking with the men that were there?

A. Yes.

Q. How soon after the accident did you arrive, do you know?

A. I would say maybe an hour and a half, maybe two hours.

Q. Were you called back because of the accident?

A. Yes.

Q. You were down in some other job, BARRE, or something?

A. EAST MONTPELIER.

Q. From your understanding, who was there at the time the accident happened, these three Martins?

A. Michael MONTY.

Q. Who was that?

A. I believe at that time he had taken over the superintendent of the job for VERMONT CONSTRUCTION. There was two laborers that were working right there and I think the others would be the Martins.

Q. Laborers for VERMONT CONSTRUCTION?

A. Yes.

Q. It is your understanding that they saw it happen?

A. Yes.

Q. And would they be, - -

A. Now, I don't know about Mike MONTY. I am not sure but I am sure the two laborers did.

Q. YOu don't know who they were?

A. I know where they live but I can't remember what their names are.

Q. Where do they live?

A. I believe it it is in EAST MONTPELIER. Go up EAST MONTPELIER or BARRE on the back road that goes from BARRE into EAST MONTPELIER and I believe the other fellow lives in ST. JOHNSBURY.

Q. Are they still employees of VERMONT CONSTRUCTION?

A. No.

Q. They are not, as far as you know?

A. No.

Q. They, - do you know anybody who would know their names?

A. Sure, I can call Mike MONTY.

Q. Would you do that?

A. Sure.

Q. Why was the rope purchased in May?

A. See, this is tricky. We figured we was going to get the job started real early and the architects came up with trouble on the color and I believe the stuff comes from CALIFORNIA, quite a a ways off. We got it, - they had to make the color and sent it to them. They would not accept the first color and this went on and on and finally, they accepted the medium gray early in the

summer, to be sure it was done.

Q. Do you buy separate rope for each job you do? Why did you have to purchase rope as opposed to having something you already had?

A. The steel cable outfit I use, it is realy heavy and you have to crank it up by hand and the only way you get up, the only way you come down, there is an eight inch timber wall and you have - you have to wheel down and with the rope it is just a straight building, as straight as that wall. It is five times simpler than it would be with cable.

Q. It is easier to use the rope than the cable?

A. Yes.

Q. Why would you use the rope as opposed to the cable?

A. As I say, it is such a straight drop, it is right up and down.

Q. Well, as opposed to what you would use, the steel cable?

A. What would that be?

Q. Yes.

A. Well, we use them like on, - well, you don't know where there might be some out-projections, like go up the building 40 feet and you have this jutting that you have to go out 2 feet, something like that.

Q. How would that effect whether you would use steel or rope?

A. With the cable you can go back to the roof and put a block against the soffits that come out of the cable, where a rope you cut it from pulling on that.

Q. I see. What you are saying when you have projections on the side of the building, the cable might be rubbing up against some of these projections, so you feel it's safer to use, then, the cable?

A. Yes.

Q. Where did you start in that habit? Were you trained to do that by somebody?

A. I was going to say at the same time I have always used the cables and these guys, I am sure they wanted to use the ropes anyway.

Q. Why is that?

A. Like I say, that cable is a hard job to work. That thing was 7 or 800 pounds and you can use four.

Q. Have you used cable on buildings like this before?

A. Yes.

Q. That goes straight up and down?

A. Yes.

Q. You prefer cables?

A. Yes.

Q. Why do you prefer cables?

A. Feel safer with them. I don't know why.

Q. Did JOHNSON have equipment available to use the cables on this project if they wanted to use them?

A. Yes.

Q. Whose choice was it then, to use the rope?

A. As I say, I am pretty sure it was Sam's and Marvin's. I wouldn't swear to it. Maybe we had the new rope and

automatically used the rope.

Q. You are the Foreman on the job?

A. Yes.

Q. Are you the guy that has the final say?

A. On what kind of stuff they use? No, whatever, - you know, - whatever we come up with, - the best solution to use.

Q. When you say "we" again, --

A. In this particular, - -

Q. - - you all get together and discuss it?

A. Like if MARVIN and SAM are going up and they want to use the ropes or the cables, whatever they prefer at that time, - we had both. It made no difference to us.

Q. The looping process with respect to the rope, is that something you had had done before?

A. This here?

Q. Yes, I am looking at Plaintiff's Exhibit #1, with looping on the ends. Who did you say did that?

A. Donald UNDERHILL.

Q. And he had done that for you before?

A. No, hadn't done it for me. This is what he did in the Navy for about twelve years and then he came to work for us.

Q. Never done it before for you, though?

A. Could have done it on jobs in BURLINGTON and in ST. ALBANS that I wasn't on.

Q. Why did you have him do it?

A. He lives right behind me and I knew he did it.

Q. is that something he did right away when he got it in May of '71?

A. Same day we got the rope.

Q. How did you cut it, with a regular knife, do you recall?

A. Just a knife.

Q. And that is when you cut them into two, 300 feet pieces?

A. Right.

Q. How did you store it? Did you store it in a rounded drum of some kind?

A. No, those electrical rolls. My brother-in-law works for the Electric Light Company. I had it wound up on that. That is the reason why I took it to my brother-in-law's, because he has a door that is probably, oh, five feet wide and high and you can roll that right in. This is why I gave it to the other fellow. I had to take it off the rolls because the rolls wouldn't go in the trunk.

Q When you originally bought it, how was it stored? On a roll of some kind?

A. I do not think it was. I think it was rolled in a box, in a coil in the box.

Q. Do you know if it came from the factory in that section, or they had to cut it in a 600 foot piece? You say it came in a box. Was it in a box? Do you know where it was put in a box?

A. No, I think he went upstairs and got it, - brought the

box down. I don't know.

Q. Did the box have the manufacturer's name on it, do you know?

A. I don't know.

Q. When you say he came upstairs he brought the box down?

A. When you go in the store, you go in the first part and then the back, as I say, he could have gone upstairs or out in the back room. I don't know.

Q. How long did it take him?

A. About 15 minutes, something like that.

Q. You didn't accompany him at all?

A. I did when we got the tackles but not when he got the rope.

Q. Did you observe the ends of the rope at some point after you bought it?

A. Observe the ends?

Q. The ends. Do you know whether the ends had tape around them?

A. No, I don't believe they had tape on them when we got it new, no.

Q. Were the braids loose at the ends at all?

A. They might have had a string. I think they might have had a very fine string like a nylon string or tie on them. I am not sure. I am not for sure.

Q. On both ends?

A. I am pretty sure they was.

Q. Is this something you had occasion to do before, - purchase

this particular kind of rope?

A. No, I did not.

Q. The first time you purchased it?

A. Yes.

Q. When you went there you were sent by Mr. JOHNSON?

A. Yes.

Q. And did he tell you precisely how much rope to buy and exactly what kind of rope?

A. I am pretty sure he did. I don't really recall. I am pretty sure he did.

Q. Would that be JACK, or DICK JOHNSON?

A. Jack.

Q. The block and tackle that you used, did you have any similar equipment that he had owned earlier?

A. Did I have?

Q. Did he have any similar equipment before that?

A. Oh, yes, I am sure.

Q. Do you know why you bought the new equipment as well as rope at that time?

A. He just said to buy it. I presume at that time of the year with the Company in ST. JOHNSBURY and me in NEW YORK, it would be as simple to buy it new and have it. I dont know why.

Q. Did he tell you what type of stuff to buy?

A. I do not really know. We had a superintendent at that time, ROBERT SAPELL, who might have been, - I didn't do it.

Q. At any rate, you hadn't had occasion, yourself, in the past, to purchase any rope for any reason?

No.

Q. What kind of wear and stress is the rope subjected to? What kind of materials does it come in contact with?

A. This rope?

Q. Yes.

A. The only thing it could have come in contact with was the PRECO and it went up once.

Q. Do you know what the PRECO is made of? Do you still use this stuff?

A. I haven't used any since, but I have some. I could send you some labels.

Q. Would you do that?

A. Sure.

Q. So the outside of the building was more or less vertical with no projections?

A. Right.

Q. And it was cement?

A. No, it was, - you probably would come up like, say 12 feet, then you had pre-cast cement, pre-cast in the middle, - go up another 12 feet and another pre-cast cement and then the pre-cast at the top.

Q. And you were going to place the material on the outside of this PRECO?

A. Yes.

Q. This particular crew that you had working for you, Mr. DONEY,

the three MARTINS, the four of them, what would they do? Have two scaffolds, two on each one, or the four were all together on occasion?

A. I think what we was doing on there, we had some on the other part of the hospital on one end, - it was low stuff, - and this stuff you have to keep stirred pretty regular. It sets up in a certain time and they would be stirring the stuff and having it right.

Q. Two men working on the scaffolds and the other two below?

A. Yes.

Q. Do you know whether you had two scaffolds or more than one scaffold used at once on that project?

A. No, we didn't.

Q Do the men lift this by each pulling the rope with a pulley on one side? In other words, one standing and pulling one side and one is pulling the other?

A. Yes.

Q. That is the way they lift this up?

A. Yes.

Q. Do you know whether they reached the top at the time the accident occurred? Had they been there for a while working, or in the process of lifting?

A. I do not believe so. I think they just about were up there.

Q. They were still working up as far as you know?

A. I think they had stopped to tie off.

Q. Had they tied off?

A. I am not sure.

Q. When you got there, were the ends tied wherever they tied them? How would they do that? What did they tie them to?

A. You just make a hook so it is pulling on the other, so it can't go back down.

Q. Tied right on to the rope, in other words?

A. I do not think they were tied. Of course, Sam,MUCKER, would know about that a lot better than I would.

Q. Do you know from talking with the other men whether both sides of the rope broke at one time?

A. One broke and then the other.

Q. Do you know which side broke first?

A. It had to be Marvin's side.

Q. YOu don't know what direction he was? That would be North, South, East or West, as opposed to the other fellow?

A. No.

Q. Okay, when you went in to order the rope at REYNOLDS, did you say anything to him as to what you wanted, other than three-quarter inch rope in 600 feet?

A. And tackle blocks to rig up the center staging.

Q. How about as far as the rope was concerned, did you say anything more specific?

A. Told him we wanted three-quarter of an inch for scaffold staging, swing staging.

Q. In terms of rope, did you say anything?

A. I told him I wanted it for swing staging, knowing they

would know what to give me, you know.

Q. Did you say "manila" or "nylong," anything to that effect, or just say "rope"?

A. I believe I said "rope for a swing staging".

Q. Okay, did you observe any kind of a display of rope or anything like that before you bought it or at the time you bought it?

A. No.

Q. Had you or anybody from your firm, purchased rope from this particular store before?

A. I don't know. I don't believe so, no.

Q. So, you don't know, as far as you know, in the course of dealing whether your employees went in from time to time and bought the same type of rope over and over again?

A. Not at that place, no.

Q. Did you buy it some place else?

A. STANLEY, or, I presume JACK.

Q. Do you know if he bought it at this place, or where he usually went?

A. NO.

Q. You don't know?

A. No.

Q. How long had this crew, the MARTINS and Mr. MOUSSEAU, worked before the accident occurred?

A. On number of jobs?

Q. Yes.

A. Quite a long time, five, six years, maybe.

Q. Had you been with them all that time?

A. I worked on one job up here for a couple or three weeks, two weeks I guess, over at the, - I don't know what the name of the building is now.

Q. In BURLINGTON?

A. Over here, back up on Pine Street.

Q. So, five, six, seven years they had maybe worked together?

A. Maybe longer.

Q. Were they together when you came to the firm? They had already been working?

A. Yes.

Q. All of them?

A. I know the MARTINS had. Whether MARVIN had or not, I don't know. I had only seen him in the winter before that.

Q. Was this a full-time job for Mr. MOUSSEAU?

A. I believe so.

Q. All year round, if there was work available, at least, - do you know what they were paid?

A. They would get NEW YORK State's scale. I don't know what it was over there.

Q. Varied, depending on whether he was working in VERMONT or NEW YORK?

A. No, the same scale.

Q. Is that union?

A. Yes.

Q.

Q. What union is it?

A. Gee, I don't know what the number is. I believe it is right in PLATTSBURGH.

Q. What kind of workers, construction work, is union?

A. No, painters and interior decorators.

Q. And it would be out of PLATTSBURGH

A. I believe they are out of PLATTSBURGH, yes.

Q. Were you a member of that Union?

A. No, we were out of BARRE.

Q. Were you a member of the same kind of union, though?

A. Yes.

Q. Do you have training courses at all that you are taught in the union?

A. No.

Q. Everything is on-the-job training?

A. Yes.

Q. Do you know specifically with respect to Mr. MOUSSEAU, what his experience was in the use of scaffolding, how much experience he had?

A. I am sure he had a lot because when JACK sent him over he said the boys were out of work and they had all kinds of experience, show them what to do and they had done a lot of it before.

Q. Had they worked on scaffolding in your experience, before that day?

A. No.

Q. Who was directing the work while you were absent, anybody

in particular?

A. On the scene there?

Q. Yes.

A. I would say between MUCKER and MARVIN, because SAM and CHICK were on the ground.

Q. They had equal responsibility then? Was Mr. MOUSSEAU there when you got back?

A. No.

Q. Did you know him personally at all?

A. No, like I say, just what little bit I had sent him up here on this job, that's all.

Q. How long had he been up there before this occurred?

A. On the job?

Q. Yes.

A. I believe they came on Monday morning and they were going to work 3 or 4 days, because they were working, I think they were going to work 10 hours a day and go home on a Thursday and have a three-day weekend.

Q. Why would they be doing that?

A. They have to go all the way back to PLATTSBURGH.

Q. They tried to work longer days?

A. Ten hours, four days a week.

Q. How long were they going to be there?

A. I would say probably would have taken them maybe five weeks probably, maybe six.

Q. After the accident occurred, did you go back to using the same type of scaffold?

A. CAble?

Q. Cable.

A. Steel cable, yes.

Q. Was that the kind that you had had on another project?

A. Yes.

Q. What project was that?

A. Union 32.

Q. And you brought it over from that project to this one?

A. Yes.

Q. What, the day after this accident?

A. I think it might have been 2 or 3 days later. Maybe the day after. I really don't remember just now when it was. It wasn't long.

Q. Had you had any difficulties at all with the scaffolding prior to this day?

A. No.

Q. Do I understand you correctly, the rope and scaffolding were left out over night, the night before the accident occurred?

A. Yes.

Q. Are you aware of any vandalism or damage to that building during the time of construction?

A. No.

Q. Who would be in charge of reporting that if such things did occur? Is it the Clerk-of-the-Works, or who was it?

A. Probably the boss. I would say Mike MONTY. He took over as superintendent of the job. He was Carpenter

Foreman.

Q. For the General Contractor?

A. Right.

Q. How big a contract was this?

A. I think it was a two and a half million dollar hospital, something like that. Around two million anyway.

Q. Do you remember the size of the building at all.

A. No.

Q. How many stories, floors?

A. Three floors and a basement.

Q. Plaintiff's Exhibit #1 has red coloring. Is that the way it is when it is purchased?

A. Yes.

Q. What is the reason for that, do you know?

A. I don't know.

Q. The braiding, it begins maybe a couple of feet, or the loosened braiding appears to begin a couple or 3 feet from the end of the rope with the loop on it. When did that occur?

A. That would have had to occur after JACK had it.

Q. And you say to the best of your recollection, that was a result of some test being performed on it?

A. I believe, -- what was his last name?

Q. KANUFFE. Just tell me when he came and got the other rope that they had. Did you make reference to that particular defect in the rope when you talked to him about that, - about the testing?

A. No, I never had it. It was done when JACK had it when it was in PLATTSBURGH.

Q. It wasn't like that when you gave it to JACK, or to whoever you gave it to?

A. No.

Q. Is it fair to say it has been damaged some in the process of testing, that this particular rope, its condition has been changed, let's put it that way.

A. Yes.

Q. Is that fair to say?

A. Yes.

Q. And you don't know anything about that testing, what was done?

A. No, I don't.

Q. When you commence a project of this sort, does anyone go around and inspect your equipment other than yourself and the fellows on the job?

A. The OSHA men are around.

Q. Were they around before this accident occurred on the project?

A. Gee, I am sure they had been there.

Q. Do you remember the name of the guy, the OSHA man that was around that project?

A. That one there, I think it was ROY. I do have his card somewhere. I do not remember what his name was.

Q. This invoice from REYNOLDS & SON, which has been marked Plaintiff's #2 for identification, was that given to you

on the day you picked the rope up?

A. That rope there?

Q. Yes.

A. No, I just had two colored slips.

Q. Do you know where that is?

A. Could either be at my house or I might have sent it to JACK. JACK would have one, anyway.

Q. Could you look and see if you can find that?

A. Yes.

Q. It is dated May 12, 1971. Again, you don't know if that was the previous day you picked it up?

A. No, they could have billed it a week later.

Q. You didn't have occasion at all to examine the method in which the rope was stored at REYNOLDS & SON?

A. No.

Q. When you examined the rope did it appear to be perfectly day and unmarked, as far as you can recall?

A. Yes.

Q. Can you state definitely in your own mind, that it didn't have any marks of any kind, grease marks, black marks?

A. Not definitely, no. I do not think it did, no.

Q. Did you ever take the trouble to bring it out and look at it?

A. We brung it out.

Q. When you cleared it out of the spool?

A. Yes.

Q. Did you notice anything out of the ordinary then?

A. No.

Q. Seemed to be dry?

A. Yes.

Q. When you put it on the spool, was that within a day or two of when you bought it also, or on two spools, or whatever?

A. No, I don't know. It might have been longer than that because, as I say, you take it out and think you are going to send it and we were hung up so I would put it back.

Q. When you say "take it out", --

A. Take it to Union 32 and take it back.

Q. That is in PLATTSBURGH?

A. No, EAST MONTPELIER.

Q. What did that entail when you did that, - putting it in the back of a pick-up truck, or something?

A. Yes.

Q. And you drove it back and forth, is that it?

A. No, I took it over. Let me see, Might have took it over on a Monday and decided to go with the cable there, because I don't know when we were going to start the ST. JOHNSBURY job, so we decided to use calbe on Union 32.

Q. So the same day you took it back and put it in your house?

A. Yes.

Q. And the place in your house, as far as you know, wasn't exposed to any water?

A. No.

Q. Rain, - water?

A. NO.

Q. And it stayed there until some time in September?

A. Yes, like I say, outside the Union 32 and I took it to ST. JOHNSBURY.

Q. And when was this?

A. Maybe I took it, - I don't know for sure, - I might have taken it to ST. JOHNSBURY one other time and brought it back but it would have been no more than that.

Q. Did it remain on a spool from that period of time?

A. NO, it was rolled.

Q. Rolled up in a coil?

A. Yes.

Q. When did you take it off the spool and put it on to a coil?

A. When did I? I had to keep taking it out like this. What is the man's name?

MR. TYLER: KANUFFKE.

A. He kept on wanting to see it. He came up 4 or 5 times.

Q. I am talking before the accident occurred?

A. Before the accident occurred, no.

Q. I thought you put it in the spool when you and your brother-in-law, whoever he is, cut it into 2 pieces?

A. No, I put it on the spool. That is why I figured my brother-in-law, - it was in and out of my place. It was too hard to do. My brother-in-law is the one that's got the barn.

Q. That is after the accident?

A. Yes.

Q. Before that, it had been in a coil?

A. Yes.

Q. In a box?

A. No.

Q. It was in a box when you got it?

A. Yes.

Q. Was the box sealed? Did you have to break a seal of some kind on the box when you opened it up, do you remember?

A. I think, yes, I think we did. I couldn't swear to it but I am sure we did.

Q. I don't know too much about these things but I assume if the rope came in the same condition, it was from the manufacturer it was very tightly and neatly rolled up in some way as opposed to just coiled. Do you recall as to exactly how it was rolled or coiled?

A. It was just rolled in the box. Coiled up in a box.

Q. Coiled around anything?

A. I don't believe so, no.

Q. I assume you didn't keep the box. You discarded that right away?

A. Not right away, but whenever, - with the rubbish.

Q. What was the nature of the photographs that were exhibited to you recently, - pictures of the scaffolding in its position on the day of the accident?

A. Yes.

A. Yes.

Q. And just after the accident?

A. Yes.

Q. Had you used any of the equipment, the pulley, the tackle and so on, prior to the ST. JOHNSBURY project?

A. No.

Q. Who constructed the outrigger and so on?

A. We all did, all five of us.

Q. And that is something you would have done the day before the accident?

A. I think we did it the day before and had it all set up in the next room.

Q. The night before the accident was the scaffolding left in a position where the bed was on the ground and the ropes stretching up to the outriggers?

A. Yes.

Q. Is that the way you generally leave the scaffolding from one night to another during the project?

A. Yes.

Q. Did you make any kind of an attempte at all to fix it so that kids can't get on the thing and move it up and down?

A. Yes, like if you leave it in a city, hang it up, maybe eight, ten feet.

Q. Part of the rope reaches the ground?

A. Yes.

Q. Did you examine the broken areas on the rope right after

the accident?

A. Yes.

Q. What did you observe? What did they look like?

A. Just looked to me like they simply pulled right apart.

Q. Were there breaks, if we could look at the different braids or strands of the rope, were they all broken at the same place?

A. No.

Q. Were they broken at different places?

A. Different spots.

Q. Was that true on both sides of the rope?

A. Yes.

Q. Did you examine the rope? Did you specifically look at it to see if you saw any foreign material of any kind on it?

A. I don't know. I don't believe I did. I looked at the rope, I didn't see nothing.

Q. Did you specially look to see if you could find any unusual material of any kind on it?

A. No.

Q. Did you find any evidence of cutting on the rope?

A. No.

Q. Did you find any evidence of breakage or near breakage in any area of the rope, other than the portions that were actually broken?

A. No.

Q. You recall why you kept 3 pieces of rope in your possession

and delivered one to another person?

A. I just wanted JACK to see how it was. The boys were going right by the office anyway.

Q. Did both sides appear to have broken in the same way, as far as you could tell from looking at them?

A. Yes.

Q. And you kept one of those short pieces and gave the other one to JACK or the Commissioner of Labor and Industry?

A. I had my car. SAM brung that one to PLATTSBURGH the same day that one went back and the Labor Board picked the other one.

Q. The braiding that was done by Mr. UNDERHILL, do you recall again the precise time when that was done?

A. When it was braided?

Q. Right.

A. It was braided the same night we got the rope.

Q. Were you there at the time he did that?

A. Oh, yes.

Q. So he didn't take it into his possession at all?

A. No.

Q. As far as you know, the rope was never used for any other purposes other than being put on that scaffold, is that right?

A. That's right.

(RECESSED FROM 10:05 A.M. TO 11:05).

THE COURT. You may proceed, Mr. Erdmann.

MR. ERDMANN: Thank you, Your Honor. Ladies

and Gentlemen, at this point in the deposition the examiner for our firm was a Mr. Dewitt Mead, so I will read the questions that were propounded by Mr. Mead.

CROSS EXAMINATION BY MR. MEAD (MR. ERDMANN):

Q. Mr. Doney, what was your job with JOHNSON Industry?

A. I was Johnson's Foreman.

Q. For all his projects?

A. No, just around taht area, the MONTPELIER area, like that and he had men in BURLINGTON.

Q. How many jobs were you Foreman over on the day of the accident?

A. let's see. I think I had ST. JOHNSBURY and we did UNION 32. Yes, I know that day I went right back to ST. JOHNSBURY.

Q. And you have worked for JOHNSON for eight years?

A. Right.

Q. And what had you done for him over the years?

A. Fire-proofing, taping, paneling, painting.

Q. Were you a foreman for the eight-year period?

A. No, about seven and a half, I guess. 7, 7½.

Q. Had you purchased products before from REYNOLDS & SONS?

A. Yes.

Q. How many times, approximately?

A. Oh, I would say several times. Merely items like fire-proofing. We might need blots or wrenches or whatever they might need.

Q. Did they know you pretty well in REYNOLDS?

A. Yes. No, I don't know as they knew me, personally. They knew JOHNSON PAINTING.

Q. Would you sign the invoices when you purchased a product?

A. Yes.

Q. And they believed you worked for JOHNSON, so you were never challenged?

A. No.

Q. They knew you were working for JOHNSON?

A. Yes, we was doing a job right across the road from the BARRE Hotel, only three blocks from where they were. We was there for maybe 5, 6 months, 7 months.

Q. Ever purchase any rope from REYNOLDS?

A. I don't know as we did before. Might have purchased a couple of safety lines. I don't know if we got them there or some place else.

Q. Who told you to purchase the rope at REYNOLDS?

A. At REYNOLDS?

Q. Yes.

A. Nobody said specifically to go to REYNOLDS.

Q. How did you happen to go there, then?

A. About the only place around that area that we could get it, unless you want to go to some place like HARRY's or a feed store.

Q. Who suggested a rope was needed, or was that your idea?

A. The rope was needed?

Q. Yes.

A. Well, at the time, I think before the fellows came over

from PLATTSBURGH, I think it was BOB SAPELL who was the superintendent at that time at all the jobs for JOHNSON.

Q. He worked for JOHNSON?

A. Yes, like I say, we were going to start in May, - wanted it done before cold weather sets in. It was a straight building.

Q. So it was his idea to get the rope?

A. Yes, either his or JACK's.

Q. But it wasn't your idea?

A. I don't believe so. I might have said: "Why don't we get some rope and tackle blocks". I don't think so, but I might have. I don't know for sure.

Q. During this time you did have tables from which you could hang scaffolding, is that correct?

A. Yes.

Q. Had JOHNSON Industrial Painters ever used rope before?

A. Oh, yes.

Q. But you had never used rope?

A. No.

Q. Who would use the rope for JOHNSON to hold the scaffolds?

A. Could be a hundred guys. He has an awful lot of guys. I am sure SAM and MUCKER and MARVIN did.

Q. And you indicated that it was the determination to use rope or cable, it was left up to the workmen that were going to be on the scaffolds?

A. Not at that time. At that time, - I don't know, the

boys were coming over from PLATTSBURGH. We'd just decided, - I don't know how we came about to use rope. It might have been some of my local men that were pushing it, or the boys from PLATTSBURGH. As I said, we had the rope in May before we started the job.

Q. Did you have other rope you could have used?

A. Special rope, no.

Q. But you said JOHNSON had rope in the past to hold scaffolding?

A. Right.

Q. What happened to that?

A. Probably, on other jobs.

Q. If JOHNSON had rope there was none available that you could use at ST. JOHNSBURY?

A. Right. Rather none available to use. He might have been figuring, get the rope and we will have it to use in that area, instead of running back and forth to PLATTSBURGH every time you wanted a rope.

Q. Do you remember what time of the day it was when you went to REYNOLDS?

A. I don't know. I think it was right after lunch, 1:00, 2:00 o'clock.

Q. Where were you working that day?

A. That I purchased the rope?

Q. Yes.

A. Let's see, I would say, probably Union 32.

Q. Where is that located?

A. EAST MONTPELIER.

Q. Could you describe for us very generally, the building, the REYNOLDS & SON building?

A. It is a big, long block, similar to the block up here with a lot of houses on it. Their store is right in the middle of the big block.

Q. One or two-story building?

A. Two and probably basement. Two stores and the basement.

Q. Two stores? And you, as a customer, could go and purchase items?

A. Yes, I believe so, yes.

Q. Have you ever been upstairs?

A. I have never been, no, I have seen the stairs go up. I am sure that is what it is for.

Q. Have you ever seen customers go upstairs?

A. No, I don't know. I probably have and wouldn't pay no attention, somebody is walking up the stairs, you know.

Q. Do you know where this rope was stored, or the rope you purchased was stored?

A. Either stored out back or upstairs. I don't know exactly for sure where it was stored.

Q. What does "out back" mean?

A. You go in back, the main street is here, this is the counter and you go through this way to go out back of the building or upstairs. That is where they stored the stuff, outside of the wrenches and compressors that

are stored out front in the building.

Q. Out back is inside the building, but out back of the building?

A. Yes.

Q. What else is stored there?

A. That is where I got the tackle blocks that were out back.

Q. What other goods are around there?

A. They sell everything, compressors and what-have-you, - you want it, they got it, just about.

Q. You didn't go back on the day you picked up the rope?

A. Yes, I got the tackle blocks the same day I got the rope and I went out back to where the tackle blocks were. You go in the front door, you go through the store and there is a door as you go to the back parking lot and on the wall is where they have the tackle blocks, because the tackle blocks they brought out first, had no hooks on them so I explained what they wanted and we went out and got the ones with the hooks for the braid to go into.

Q. You don't remember the employee's name?

A. No.

Q. But the same gentleman who showed you the tackle blocks?

A. Yes.

Q. Did he help you to get the rope?

A. Yes.

Q. Did he get that before or after the tackle blocks?

A. I believe he got it first.

Q. What did he do with the rope when you were looking at the tackle block?

A. I don't know, - set it on the floor beside the counter. I don't know.

Q. So you picked up, - you selected the tackle blocks you wanted and then what did you do?

A. Made out the slip and left.

Q. Signed the slip, took the tackle block and left?

A. Yes.

Q. What were you driving?

A. 1970 GMC pick-up.

Q. Open truck?

A. Yes.

Q. Put it in the back of the pick-up?

A. Yes.

Q. Where did you then go?

A. To my house in NORTHFIELD.

Q. Didn't go back to Union 34?

A. 32?

Q. Yes.

A. No, I went home.

Q. You took the rest of the afternoon off?

A. No, it was 2:00 or so and by the time I got there and got back, it was probably, - I probably worked half an hour over-time, plus 3 hours at night, to string it.

Q. What do you mean by "string it" ?

A. Braiding it and putting it through the tackles, through the blocks.

Q. You did that the night you bought it?

A. Yes and I am not positive, - we did braid it the same night I bought it, yes.

Q. Were you transporting other items of equipment on the back end of your pick-up truck at the same time you picked up the rope?

A. I do not believe so but I don't think so, no.

Q. So the back of your truck was empty except for the rope and the blocks?

A. And a spare tire, yes.

Q. Any gas cans?

A. No.

Q. Any volatiles of any kind in back of your pick-up?

A. No.

Q. You think you went right from REYNOLDS to your home?

A. Yes.

Q. The day you picked up the rope and what did you do with the rope?

A. Took it out of the truck and called up Donald UNDERHILL and had him come over and string it out and cut and braid it.

Q. From the 600 feet rope?

A. Yes.

Q. Where did you string that out to cut it and braid it?

A. Right straight past my house, past my neighbor's lawn

and right up through to the store and cut it in the middle. Went right up, came back down and cut it.

Q. How did you know it was the middle?

A. It has two ends. It is about in the middle.

Q. You took both ends and laid it, - -

A. Yes.

Q. - - up and down 2 lines, coming together?

A. There is a post that sits in the yard. We put it and went up through and when he came even on both ends, we cut it in that notch.

Q. How did you string out the rope? One man holds the box and the other holds the end? How did you do that?

A. I presume so. I don't really know.

Q. You don't remember how you strung it out?

A. As far as taking it out of the box, I don't know, no. I can't remember if we dumped it out, picked the end, one end up, went up with it and took it gradually out of the box and went up the road.

Q. Mr. UNDERHILL was there?

A. Yes.

Q. He helped you?

A. Yes.

Q. What did you use to cut it?

A. A knife.

Q. Your knife or Mr. UNDERHILL's?

A. Mine, I guess, I don't know.

Q. You don't remember?

A. No.

Q. After the rope was cut in half, Mr. UNDERHILL started to splice it?

A. Yes.

Q. How many splices did he make?

A. I don't know. Oh, just 2, one on each cable. He braided two ends that went on to the two tackle blocks.

Q. When you finished you had two, 300 feet pieces of rope, is that right?

A. Yes.

Q. And each rope had one end that was braided?

A. Right.

Q. By Mr. UNDERHILL?

A. Yes.

Q. What happened to the unbraided end of the two pieces of rope?

A. I believe we put tape around them. Either tape or, - I am pretty sure it is tape.

Q. YOu did that, or Mr. UNDERHILL did?

A. Taping I could have done, I guess, - maybe he did, - it was done all together anyway.

Q. Some kind of tape?

A. I would say it is the same as is on the braid in there.

Q. The end braids, the loop on Plaintiff's #a, the tape towards the loop?

A. Yes.

Q. Is that what you are referring to earlier?

A. I do not follow you.

Q. You said the tape that you put on the ends of the rope the night he spliced them was the same type of tape that appears on Plaintiff's #1?

A. Yes.

Q. Is this the tape that begins close to the loop?

A. Yes.

Q. It is not the same kind of tape that appears on the end of Plaintiff's #1?

A. No.

Q. Did you put that on?

A. Yes.

Q. When?

A. The same night we were braiding it.

Q. Were you assisting Mr. [illegible]ERHILL to braid, then?

A. I don't know anything about braiding. All I did was putting the tape on. I don't know if I put the tape on, - he could have put the tape on.

Q. It was done that same night then?

A. Yes.

Q . Then what did you do with the rope?

A. Put it up in my attic.

Q. In what container, if any?

A. None.

Q. In no container?

A. No.

Q. Did you roll up the two, 300 feet sections?

A. Yes.

Q. How did you roll them up?

A. A round cirle, like this.

Q. On the ground?

A. Yes.

Q. And then you carried each roll o. coil up to your attic?

A. Yes.

Q. Where did you put it in your attic?

A. Right on the floor.

Q. One on top of the other, or side-by-side?

A. I believe theywere side-by-side, but I couldn't swear to it. They could have been on top of each other.

Q. What else was stored in the attic?

A. We have a baby crib up there, couple of pairs of crutches, - I guess that is about all.

Q. Do you often store your equipment up in the attic?

A. No, most of our equipment is heavy stuff. I put it in the barn.

Q. Why didn't you put this in the barn?

A. I wanted it to be dry. I didn't know if I would need it in the morning, - get a telephone call, - it was simpler to go up and get it than to chase up in the barn.

Q. Is your attic closed off?

A. Yes.

Q. How do you gain access to it, by a regular attic door?

A. Window.

Q. Where is the window located?

A. Right at the end of the house.

Q. You empty your attic from the outside of your house?

A. Yes.

Q. A fairly new house?

A. No.

Q. How old a house is it?

A. Oh, an old house.

Q. Approximately how old?

A. 50 years old, - I don't know, 50, 60 years old.

Q. Any ventilation in the attic?

A. No, only what would have come in from the window I guess.

Q. The window was open?

A. There was none unless it came in around the window. In the winter time I cover the window up with poly or banking paper but in the summer time it is just the window and the opening.

Q. Had you taken the poly off the window?

A. Oh, yes, - this was in May or June.

Q. So the rope was placed in the attic in May of '71?

A. Yes.

Q. And when was it next moved or next touched by you?

A. When I took it to Union 32.

Q. When was that?

A. Gee, I don't know. Could have been 3 weeks, a month maybe.

Q. After?

A. After we had it braided. After we bought it, yes.

Q. So, did you take both coils of rope?

A. Yes.

Q. You took the coils and threw them in back of your pick-up?

A. Yes.

Q. What else was in the back of your pick-up at the time you were going to Union 32, do you remember?

A. Some step ladders, maybe a roller handle, that would have been about all.

Q. How many times did you take them to Union 32?

A. I think I took them to Union 32 once and ST. JOHNSBURY Once before we used them. They still hadn't made up their minds, so I brought them back.

Q. When you got to Union 32, why did you get the ropes? What did you do with them, leave them in the truck?

A. Oh, yes.

Q. Did they leave the truck?

A. No, I did not take them out.

Q. Why was that?

A. We went out for, - we had the cables there to begin with and they said they would just as soon use the cable as the rope and I felt as long as you are willing to use the cables, then I will take the rope back home.

Q. When you took the rope back home, what did you do with it then?

A. In the attic?

Q. Same place?

A. What do you mean, "same place"? "Same spot"?

Q. Same spot it had been before?

A. Not exactly the same spot, but in the attic. Could have been 2 or 3 feet from where I had it before, I don't know.

Q. Did you inspect the rope when you got it over to Union 32?

A. No, we weren't going to use it anyway.

Q. Was it coiled up?

A. No, the rope come round and tight.

Q. So you used the same rope to keep it coiled together, you didn't use an extra rope or spare rope?

A. No, just the end of that rope there.

Q. And when were the ropes taken out of the attic a second time?

A. Like I say, I took them to ST. JOHNSBURY one day, which is when, - I don't know when it was and we didn't use them there and I took them back home from there.

Q. Was it soon before September 30th? Do you remember how soon before the accident, what period of time you took them to ST. JOHNSBURY?

A. Month, six weeks, maybe.

Q. At somebody's request?

A. No, our PRECO came in. they still hadn't made up their mind on the sample. We sent a sample over to the architect to find out if he wanted this color or not, so I took it back home.

Q. At the time you took the rope to ST. JOHNSBURY, had you determined the ropes were going to be used in that

scaffolding?

A. No, MARVIN and the boss weren't, - they didn't come. Maybe they were there. I think they worked inside maybe 3 or 4 days maybe, before we decided to use it then, inside the building.

Q. The day before the accident on the 29th, did someone ask you to bring the ropes to ST. JOHNSBURY?

A. Asked, no.

Q. YOU just brought them of your own accord?

A. Yes.

Q. When you brought them back from ST. JOHNSBURY the first time when they weren't used, did you store them back in the attic?

A. Yes.

Q. And the day you did bring them up on the 29th, you brought them from the attic and put them in the pick-up?

A. Yes.

Q. Did you use your pick-up to transport paint and other items that you used in the day-to-day conduct of your business?

A. In every day most of it was not like that rope. It was moved right from the place where DICK picked up hundreds of gallons, probably took a couple of hundred gallons. It comes in 5-gallon pails from ST. JOHNSBURY. One gallon, sure, go down town and pick up a gallon of paint.

Q. What did you use to clean off your brushes?

A. The brushes, latex paind, water, oil base, thinners.

Q. What did you use in ST. JOHNSBURY?

A. PRECO.

Q. What did you use to clean?

A. Just water.

Q. You delivered the ropes on the 29th to ST. JOHNSBURY, is that correct?

A. Yes.

Q. And then what happened when you arrived?

A. Then we took the bed at this time and strung them up, the 5 of us and had it hanging from the building and the next morning the boys started, the next day.

Q. Did you take them right from the truck and put them on the scaffolding, or throw them on the ground and wait before you strung them?

A. No, I am pretty sure we took them right out of the truck. As a matter of fact, I am almost positive my car was on one end and we stretched them out to get them out for length, they were straightened together. We should have set them on the ground. I do not really remember.

Q. Do you remember what time of day it was that you strung this scaffold?

A. It was in the afternoon.

Q. What time did you arrive at work that day?

A. At ST. JOHNSBURY?

Q. Yes.

A. Must have been a little after 7:00, a little after.

Q. Did you bring any other products with you to help you work that day, - any other equipment of any kind?

A. No.

Q. When was it discussed about using the ropes rather than the cables?

A. Could have been 3 or 4 days previous to the hanging of this, because the boys were working, as I say, a week, 3 or 4 days inside before we ever started the outside. I am sure MARVIN, MUCKER, would remember, SAM, any of the boys.

Q. But you didn't particularly care what was used, ropes or the cable?

A. No.

Q. Was there anything else done to the ropes besides the splicing before it was put on the scaffolds or on the blocks?

A. Just the coating and splicing, that's all, - unrolling it from the box, but that is all.

Q. What is the end, looped end of Plaintiff's #1 inserted in to or connected to?

A. That is hooked to the outrigger on the top of the building. The bottom of the pulley, tackle blocks. In other words, it is hooked to that there.

Q. How would youhook this to the tackle block?

A. You have two ropes. They go down to the center of the wheels. The wheel is here and on the side of each wheel an iron, the rope, two ropes go down like this with a

round wheel that is right in here, with a bolt. Take this bolt out, pull this here out, put your wheel in there, put it back in the tackle block and tighten it back up.

Q. Is that item of equipment called a tackle block?

A. What that hooks into?

Q. Yes.

A. They probably have some name for it, I don't know.

Q. You call it a tackle block?

A. yes.

Q. So what happens, the rope goes from the tackle block on the roof, - -

A. Down, up through, back down.

Q. It goes down again?

A. To the other tackle block that is hooked to the bed and back up.

Q. And back up through the same block that is on the roof?

A. Yes.

Q. Explain to me how two ropes, one that is connected, one that is fastened and one on a pulley, can go through the same block?

A. No, the little wheel is below the tackle block there two eyes go down. this is all separate from there, two ropes go down like this.

Q. From the support?

A. It is hooked right in with the tackle block.

Q. So the actual turning mechanism of the block is above?

A. Right.

Q. And then so it goes down again and then where does it go?

A. Through your block on the bottom, through your bed, you have double blocks. You have to repeat yourself over again and the other end of the rope, of course, is what you pull yourself up with.

Q. The end hangs near the ground, does it?

A. Yes.

Q. Does it have to hang near the ground?

A. Does it have to?

Q. In other words, when you are pulling yourself up on the scaffolding, is someone assisting you from the ground, or the men pulling themselves up while they are on the scaffold?

A. The men are pulling themselves up while they are on the scaffold.

Q. So, if the thing didn't hit the ground it wouldn't make any difference?

A. If it didn't?

Q. Yes.

A. No.

Q. And the date of the accident was the first day this rope had been used?

A. Yes.

Q. You asked REYNOLDS for brand new rope, did you, when you ordered it?

A. Yes.

Q. Did you ever inspect the rope to make sure that it was what you ordered?

A. Yes, I think as a matter of fact, all 5 of us did, the night we strung it. We was all looking at it on the job, rolling it out, pulling the blocks out. I am sure all five of us were looking it over.

Q. What pieces of metal would come in contact with this rope?

A. Metal?

Q. Yes, when it was strung on the scaffold?

A. No metal. See, they are wood wheels.

Q. The wheels are wood?

A. The wheels are wood.

Q. The only metal would be the pin that holds the one end in place, up on the roof?

A. That there goes through. That insert that goes through, that is the only piece of metal it comes in contact with.

Q. Any grease on that block?

A. No, wood.

Q. How do you account for the black mark on the inside of the loop of Plaintiff's #1?

A. This here might have come off from where it rolled on the wheel. That is the only thing I can think of it can be from.

Q. That is moving back and forth on the wheel?

A. Not back and forth but on account of the wheel, it can turn, so it won't be binding. The whole wheel turns.

Q. Is that a wheel that, - that connects into, or a metal pin

that loop goes into?

A. The wheel sits right in here and the pin goes through here in the center.

Q. So the pin does not come in contact with the end of the rope then?

A. No, no.

Q. What is an eye hook?

A. That is what we hook it on to the top with. You know, down here. The outrigger hooks on to there and then it is hooked on to the bed.

Q. What did the eye hooks hold?

A. The tackle blocks.

Q. Do the eye hooks come in contact with the rope?

A. They are up above, too. I guess I should have brought them.

Q. So the scaffolding was rigged up for use on the afternoon before the accident?

A. Yes.

Q. And you say it was tested?

A. Yes.

Q. Was it tested that afternoon?

A. I am pretty sure it was, yes.

Q. Do you remember who tested the scaffold?

A. I think it was MARVIN and MUCKER who got on it, jumping up and down. Could have been SAM. Could have been SAM got on it.

Q. How many men tested it?

A. I think it was two. Might have been all three of them.

Q. Were you present when that was done?

A. Yes.

Q. But you do not remember how many men tested it?

A. I do not remember. You jsut get on it and jump.

Q. Approximately how high up was the scaffold when the test was conducted?

A. Three or four feet, probably.

Q. Was it tested the next morning?

A. That, I couldn't tell you. I don't know.

Q. When did you arrive on the job the morning of the accident?

A. Of the accident?

Q. On the 30th.

A. Oh, let's see. I can't remember if I went to Union 32 first or went straight to there.

Q. When you did arrive, was the scaffold in place?

A. No, I don't believe it was. They was still working down low. Either that or inside and I think I was having trouble with it for the coloring and that is the reason they hadn't gone up on it yet.

Q. Trouble with what?

A. The shade of it. See, the milk is white and this comes in a powder. If you put too much in,it will turn a different color than the sample was.

Q. When was the scaffold put in use then?

A. Must have been around 10:00 or 11:00 o'clock.

Q. How was it left over night? Where was the scaffold when it

was left over night?

A. On the ground, right beside the building.

Q. Over on the building?

A. Right.

Q. And the rope hanging down from the blocks on the roof?

A. Yes.

Q. And all rigged for use the next morning?

A. Yes.

Q. Anything have to be done to it to get it in use the next morning?

A. I do not believe so.

Q. All you would do was start pulling on the ropes and you would go right up, is that right?

A. Yes.

Q. Where would you secure the ropes after you reached the height you wanted on the scaffold?

A. You mean to tie-off?

Q. What does "tie-off" mean, to secure yourself?

A. So you won't go down, yes.

Q. Where would you secure the ropes?

A. Those were tied with all 4 ends together, with a knot. See, I can't remember if the bed had a little hook out like this.

Q. Would you describe the little hook?

A. A little hook that comes off the "V" that your bed sits in.

Q. Is that a metal hook?

A. A metal, yes, I don't think, - I think they had to tie ropes right off.

Q. What do you mean by that?

A. You have to get the four ropes together and tie it off.

Q. Tie them together unto themselves, so they don't slip?

A. I wasn't there, so I don't know.

Q. You said there was a cable on the scaffolding the day of the accident, was that correct?

A. A cable?

Q. Yes.

A. On the scaffolding, we have cables on the outriggers that would hook the hooks and the tackle blocks on.

Q. There were no cables coming from the blocks to the scaffolding on the day of the accident?

A. No, the only thing hanging from the roof was the ropes to the scaffold, is that correct?

A. Yes.

Q. What was the difference between the ST. JOHNSBURY Job and the UNION 32 job, as far as use of cables or rope?

A. Time-wise, mostly.

Q. Would you tell us what you mean by that?

A. The cable is so much slower than rope. In this particular job you are going 10 to 15 feet. ST. JOHNSBURY, you are only pulling yourself up along 3 feet, - paint, - and then go up another section to paint the rest of it. Because, at Union 32, you can continue up with stain. At ST. JOHNSBURY the whole job you only had about 16

feet of paint.

Q. So was it really then the workers on the scaffold decision to use the rope, or Mr. JOHNSON's decision, then?

A. JACK didn't have anything to do with it. I am almost positive SAM and MARVIN and MUCKER wanted to use the rope because the cable is hard to work. It is real hard work to pull them.

Q. You indicated when asked by Mr. AFFOLTER, that the rope broke in different spots. What do you mean by that?

A. Well, one rope broke. Like I say. Maybe 18 feet down from the top of the tackle block and the one on the other end broke at say, 20 to 21 feet down on the tackle block on the other end of the bed.

Q. I don't have anything else.

REDIRECT EXAMINATION BY MR. TYLER:

Q. It is Mr. FITZPATRICK who saw you last Saturday?

A. Friday night he saw me, - called me Saturday.

Q. He saw you Friday and called you Saturday?

A. Yes.

Q. What was his first name, do you know?

A. FRANK or FRED. I think he said FRANK.

Q. Where is he from?

A. MASSACHUSETTS.

Q. Did he appear to be an expert on rope or something?

A. No.

Q. Just an investigator?

A. Yes.

Q. He had some pictures to show you?

A. He had pictures even when MARVIN was still on the ground there.

Q. You don't know who took these pictures?

A. The State Police.

Q. Were they all State Police pictures?

A. Yes. I didn't look at every single one of them but I looked at one of them and it was State Police. He must have got it from the State Police.

Q . Do you remember how many photographs there were, all together?

A. I believe, five.

Q. And there were at least five?

A. Yes.

Q. And he wanted you to look at the rope through the magnifying glass?

A. Yes.

Q . For what purpose?

A. That is when he saw those brown spots, when he looked at it with the magnifying glass . Of course, he had the whole shot of the whole building and the rope was strung right out down the front of the building and he wanted me to look at it through the magnifying glass.

Q. Did he have any other document with him? Any statement - anything?

A. Yes.

Q. What did he have?

A. Not like this. He was just writing down on a small piece of paper.

Q. What were you saying? What you were saying?

A. No, not exactly what I was saying. He had the pictures right there where he would point out, - like I was trying to explain the wheel with the pictures, itself, - this is right in the wall and he would say, "What is this?" and I would look and see it, - like I say, - I was coming down through the center of the block. Everything was right there. It was easier to explain. He could say, "What is that"?

Q. Did he have any statement he had taken from other people?

A. No, I don't think he had any other statements.

Q. He didn't read you any?

A. No, but he went to MONTPELIER and see the other end of the rope.

RECROSS EXAMINATION BY MR. AFFOLTER:

Q. The portions of the rope on each side which broke were 18 to 21 feet, approximately, from the loop?

A. Yes.

Q. Which was attached to the bottom of the tackle, which was attached to the outrigger?

A. Right.

Q. Do you know from talking with people at the time of the accident what the position of the area of the break would have been at the time the first break occurred? I don't know if you see what I mean?

A. No.

Q. Was the scaffold within an 18 feet or 21 feet of the top position at the time the accident occurred?

A. MUCKER's end was still above the building and this part was starting to come back through the pulley and the bed was laying against the building on MUCKER's part and the other end was dangling off the top of the outrigger.

Q. That is the way you saw it and the scaffold was still up in the air?

A. When I got there, - I am pretty sure it was. Now, after seeing the pictures Saturday, that is the same thing he asked me, - wanted to know what this end was in the tackle block. That is the way it was in the picture.

Q. The second end to break was nar, at, or near a pulley?

A. Right. Still in thepulley and starting to come out. He asked me what this was.

Q. And that pulley was on the bed portion, the pulley on the bed and which end of the bed?

A. The one MARVIN was on. No, the one MUCKER was on.

Q. And the other one was completely broken?

A. Yes.

Q. So, you couldn't tell where that one had been and do you remember whether they were still tied, or whether they were tied, - I think I asked you before, I don't remember what your answer was. Tied into the final position, in other words?

A. I don't think they were, but I really don't know.

Q. But it was still up in the air?

A. The base.

Q. Yes, the base.

A. Yes.

Q. What happened with the other guy? - MARVIN, I assumed fell the distance?

A. Yes.

Q. What happened with the other fellow?

A. From all I know is what MUCKER MARTIN said. MUCKER grabbed right on to all the rope and they brought him over a ladder.

Q. On his side, you mean?

A. The ladder up against the building, or put it there after he feel, but then his own rope broke and down he fell.

Q. So he grabbed on to all the ropes?

A. Yes.

Q. Did his end break also?

A. Yes.

Q. And he fell?

A. Yes.

Q. I didn't realize he was hurt?

A. Yes.

Q. Prior to the time of the accident, had either of those two fellows had any physical disability that you are aware of?

A. No.

Q. Seeing, hearing and other disabilities, walking of any kind?

A. Not that I know of.

Q. I asked you about the OSHA fellow whether he had been there. do you know whether he inspected the scaffolding at any time before the accident occurred?

A. No, I am sure he hadn't done that.

Q. Have you given any written statements to anybody about this accident, or any part of it?

A. One to his office.

Q. That is Mr. Tyler's office?

A. Yes, Mr. Tyler's.

Q. When did you do that?

A. Three weeks, a month ago, I presume.

Q. Any more?

A. To Mr. KANUFFKE.

Q. Anybody else, OSHA, State Trooper, - anybody?

A. No, no, - the OSHA and the State Trooper didn't ask me. They just looked at the accident.

Q. Did JOHNSON take any pictures the day of the accident?

A. No.

Q. The day after, or any time, as far as you know?

A. No, not that I know of.

Q. Were there any knots at all in the rope for any reason?

A. No.

Q. Never have been?

A. No.

REDIRECT EXAMINATION BY MR. TYLER:

Q. I would like to clarify one point. When Mr. AFFOLTER asked you about statements, you never gave me a written statement, did you?

A. Not you.

Q. Just Mr. KANUFFKE?

A. No, who was the fellow that came from your office from ST. ALBANS?

Q. I don't know. I will have to find out. A lawyer?

A. He said he was representing you.

RECROSS EXAMINATION BY MR. AFFOLTER:

Q. So, you have given two written statements, no question about that?

A. Yes.

Q. Do you have copies of them?

A. Yes.

Q. Could you furnish copies of them?

A. Yes.

MR. TYLER: Again, I have them with me. Why don't we put them on the record?

MR. AFFOLTER: you mean, read them?

MR. TYLER: No, just read them and put them on and then he will have the copies.

RECROSS EXAMINATION BY MR. MEAD AS READ BY MR. ERDMANN:

Q. When you returned to the scene of the accident, what was the position of the scaffold?

A. I said the scaffold was still leaning up against the end of the building.

Q. Were both ends the same level?

A. No, the end that MUCKER was on, MARVIN, was on the ground and in an upright position laying against the building.

Q. On the ground?

A. One end on the ground and the other, whatever length of rope, was off the top rigger against the building.

Q. What is the length of the scaffold?

A. Twenty-one feet.

Q. So that the end, - there was still one end being held, - of the scaffold, being held in the air by the rope, is that correct?

A. I would not say. No, this rope was already busted and started to come through the pulley, - -

Q. I am sorry to interrupt but I do not understand this. Maybe we could break it up. What do you mean, "just coming through the block", - what do you mean? The whole thing was moving?

A. No, - no. This is the rope coming down off the building, okay? Presume the other end is here, hooked to the tackle block.

Q. Yes.

A. And this rope was busted, but it was coming through, - just starting to come through around part of the pulley and the bed staging was leaning up against the building.

RECROSS EXAMINATION BY MR. AFFOLTER:

Q. When you say "busted", you mean busted through, - through completely?

A. Just like this here.

Q. Separated, or just unwinding?

A. Broke apart. The other end was gone. That was starting to come through the pulley block.

Q. Can you identify this partiuclar Plaintiff's #1 as the rope that was on?

A. No.

Q. You don't know which rope that was?

A. No.

Q. Which side of the scaffolding that particular rope was on?

A. No.

Q. But one end of the scaffolding was held suspended in the air, is that correct?

A. No. No, one end was on the ground and leaning up against the building. It wasn't in the air.

Q. When you got there the ropes weren't holding anything up?

A. No.

REDIRECT EXAMINATION BY MR. TYLER:

Q. Mr. Doney, I show you Plaintiff's #3 for identification, a two-page statement, dated October 30, 1971. This is your signature that appears on the second page?

A. Yes.

Q. Is this a statement that you gave to Mr. KANUFFKE a month or so after the accident?

A. Yes.

Q. And this was your recollection of events at that time, is that correct?

A. Yes.

Q. I show you Plaintiff's #4 for identification and this is a document that has no date, except 1973 and it is not signed?

A. No, he came over on a separate date and did this one and gave it to me to have it and sent back to his office and he sent me a print of it.

Q. And this was March 21, 1973 or some time thereafter that this statement was given?

A. Yes.

Q. And you did sign the original of this document, this document being a copy, is that right?

A. Yes.

Q. And this is your recollection?

A. Yes, I think, - yes.

Q. And this was the statement then given by you as of some time in early 1973, is that correct?

A. Yes.

RECROSS EXAMINATION BY MR. AFFOLTER:

Q. The statement of March 21, 1973 indicates that you saw Mr. MARTIN the day of the accident, after the accident?

A. Mr. MARTIN?

Q. Alvin MARTIN?

A. Yes.

Q. And he was back in the Union Hall when you talked with him?

A. In the Union Hall?

Q. this says, - oh, no, I went to the hospital, when I got there I saw Alvin MARTIN in the hall. He had a collar around his neck.

A. This ain't at the Northeastern Regional Hospital, though. I think that is the old hospital in ST. JOHNSBURY.

Q. You saw him in the hall. What was he doing at that time, walking around?

A. Yes.

Q. And he conversed with you about the accident?

A. Yes and I went from there up to the other hospital.

Q. He had on one of those neck collars?

A. Yes.

Q. These statements that were given, - Your Honor, in connection with the witness' testimony, I have marked these statements Plaintiff's #3 as Defendant's "K" for identification and Deposition statement #4 as Defendant REYNOLDS "J". We would like to offer those in connection with the witness' deposition testimony.

MR. TYLER: We have no objections. We would offer them ourselves, Your Honor.

MR. MILLER: We have no objections.

MR. ERDMANN: We have no objections.

THE COURT: Defendant REYNOLDS "K" and "J" are received.

MR. BRYAN: If it's in connection with the testimony of the deponent, in that connection, Your Honor, I think one is undated. I believe I heard something in the record that the original was signed. Does Mr. TYLER have the original? ---- That's the one of March 21, 1972.

MR. TYLER: Just a minute, we have one and I think the other one has a date on it.

MR. BRYAN: I would like to have the original substituted if it is available.

THE COURT: Do you have it?

MR. WOLFE: We are checking.

MR. TYLER: I have photo copies, Your Honor, but, - -

MR. BRYAN: We can do it later, Your Honor.

THE COURT: All right, very well.

MR. BRYAN: I have no objections if we could substitute the original.

THE COURT: If the original is available we will substitute the Defendant REYNOLDS "J" and Defendant REYNOLDS "K".

RECROSS EXAMINATION RESUMED BY MR. AFFOLTER:

Q. These statements that were given, Plaintiff's #3 and #4 for identification, now Defendant REYNOLDS "J" and "K" did you write out the language, or did somebody do that and have you sign it?

A. Someone else did.

Q. Were they writing verbatim from what you said, or doing the

writing?

A. This guy did a little bit of both.

Q. Partly his statement and partly yours, then?

A. Not really.

Q. Do you feel these are perfectly accurate, as far as you are concerned?

A. Yes.

Q. Did he put it into language? In other words, his own language and had you sign it?

A. Yes.

MR. TYLER: Do you feel these were perfectly accurate?

A. Yes.

RECROSS EXAMINATION BY MR. MEAD (BY ERDMANN):

Q. Did you read these through before you signed them?

A. Yes.

Q. You did?

A. Yes.

Q. you indicate in the last sentence of the first paragraph on the second page of the statement dated October 30, that the rope was tested to hold 5400 pounds, is that correct?

A. Now I believe he went to REYNOLDS & SON.

Q. Who is he?

A. Mr. KANUFFKE there and found out just what it was supposed to be tested for, - this particular thickness of rope.

Q. So you don't know if it was tested to hold 5400 pounds?

A. No, I don't know that it was tested.

Q. Or you don't know how much it was supposed to hold, is that correct?

A. Yes.

Q. IN THE MIDDLE OF THE FOURTH PARAGRAPH ON THE STATEMENT you signed, dated March 21, 1973, you indicated that you "Took all of the rope home with me, except a piece about 14 feet long, with a braided loop on one end, broken at the other end." Is that correct?

A. Yes.

Q. Is Plaintiff's #1 that piece of 14 feet rope you refer to in the statement?

A. Yes.

Q. What happened to the other small piece of rope?

A. I took it home and then I would say, maybe, - I don't know, a week or so later, the fellow from the Labor Board came and got that one.

Q. And again, you don't know which side of the scaffold Plaintiff's #1 was located?

A. No, but it shows right in the picture, so if you can get hold of the picture you can see which one was the longest and then you would know. MARVIN was on this side, whichever was the longest or the shortest.

MR. ERDMANN: I have nothing further, thank you.

MR. TYLER: Your Honor, I would like to indicate Plaintiff's #2 for identification referred to in the

deposition is the same invoice as appears as Defendant's Exhibit "G" which is already admitted in evidence.

THE COURT: The Deposition Exhibit #2 is the same as Defendant REYNOLDS'S EXHIBIT "G"?

MR. TYLER: Yes, Your Honor and Defendant's Exhibit "G" does have a writing on the top of it, Plaintiff's #2 for identification, 2-18-74.

THE COURT: Very well, we will recess at this time until 1:30.

(RECESSED FOR LUNCHEON AT 12:00 NOON UNTIL 2:00 P.M.)

* * *

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and sealed. Bought and sold the sealed products, as to who we bought it from and to whom we sold it and there is no contradiction. We don't expect any contradiction and we really don't see, at the present state of the evidence, why that can't be granted as a matter of law.

I don't see how we could be held liable on any implied warranty on the 402 theory without the New Bedford Cordage recessarily being liable to indemnify us.

MR. TYLER: I do have a couple of questions, Your Honor. For example, it appears that there were certain documents and warnings and so forth, passed on from New Beford by documents both the chart and what appears on the invoices, that would have given REYNOLDS certain knowledge that would - never came on to the plaintiff. So the position is somewhat different.

THE COURT: Well, we've got some more matters to tend to, the Court will not rule as a matter of law at this time on the New Bedford's, on your cross-claim. I don't think the damage is established as yet, but you may be able to, - I think we will have to handle it by interrogatories, as far as the cross-exlaims are concerned. Mr. Miller?

MR. MILLER: Thank you, Your Honor, at the close of the plaintiff's evidence, VERMONT CONSTRUCTION COMPANY moves the Court to direct a verdict in its favor against the plaintiff for the following grounds and upon the following reasons: First of all, the, taking the evidence in the light most favorable to the plaintiff, it is clear that the general

contractor was VERMONT CONSTRUCTION COMPANY and that VERMONT CONSTRUCTION COMPANY was engaged in building of the hospital in ST. JOHNSBURY, that the, both of the plaintiffs, the plaintiff's decedent and Plaintiff MARTIN, were employees of a subcontractor of VERMONT CONSTRUCTION COMPANY, namely, JOHNSON INDUSTRIAL PAINTING CONTRACTORS, who were engaged, who were engaged in an integral part of the completion of that hospital and we say that under the affirmative defense, that we have pleaded, the State of Vermont has defined, under the Workmens Compensation ACt, an employer to include not only the owner or lessee of the premises, but any other person who is virtually the proprietor or operator of the business there carried on, who, but for the reason of their being an independent contractor or for any other reason, is not the direct employer of the workmen there employed.

We say that the only evidence of the business being carried on at the time, place in question, was the building of the hospital.

THE COURT: Definition, the definition that you are referring to, I know is in the Workmens Compensation Law but can you give me the section?

MR. MILLER: I think it is 6013, I believe it is 6013. Or 4. 6013, I believe.

THE COURT: I believe it is 6013.

MR. MILLER: We say that there are, -

THE COURT: Let me ask you when that definition was included in the Workmens Compensation Act?

MR. MILLER: I don't have that.

THE COURT: Did it anti-date the 1959 amendment to Section 624, which is the third-party, where the legislature considerably enlarged the rights of the injured workmen or the carrier for the -- who is paid compensation to recover against third persons, third-party --

MR. MILLER: I don't know the answer to that, Your Honor, but our position is that the definition of employer preceeded the date of the accident and that whether or not VERMONT CONSTRUCTION COMPANY is to be regarded an employer, under the Workmens Compensation Act and entitled to its protection, would be determined by the definition of employer as embodied in the Section 601.

THE COURT: Well, do you claim that there is, that any contractor of employment or relationship of Master and Servant between VERMONT CONSTRUCTION, the General Contractor and an injured workman?

MR. MILLER: I claim that VERMONT CONSTRUCTION COMPANY is a statutory employer as defined in the Workmens Compensation Law under Section 601.

THE COURT: Well, don't you think its a purpose of that, - I take it you think there is a cloak of immunity by reason of the fact that they come within the literal definition or may come within the literal definition of an employer?

MR. MILLER: Yes, I do, Your Honor and I would like to point out --

THE COURT: Let me ask you, have, - didn't, -

-- there's no danger of any liability as far as VERMONT CONSTRUCTION is concerned as to Workmens Compensation that an injured plaintiff might be entitled to, is there?

MR. MILLER: Only as to continuing benefits that might be in a death case, but we say that payment is not a question and never has been in Workmens Compensation. I would point out to the Court that if you had a single empoyee and he was injured and he did not want to accept his compensation, that that would not broaden his rights to sue his employer in tort. He's either, his, his rights are either governed by the ACt or they are not and whether he takes his benefits is immaterial as to the immunity granted to the employer.

LARSON, on his treatise on Workmens Compensation in Section 72.31, feels that VERMONT is one of those many jurisdictions which defines a statutory employer to include a general contractor and LARSON cites the VERMONT case of MORROSEAU versus LEGATT in 123 Vermont, page 70, decided in 1962 which holds that both the sub-contractor and the general contractor are primarily liable and being primarily liable for Workmens Compensation benefits, it's immaterial which one makes the payment to the Workmens of the liability of either the sub-contractor or the general contractor is, as defined by Workmens Compensation Act and not otherwise.

There are three jurisdictions that have identical wording to the - along with the VERMONT definition of employer. they are IDAHO, HAWAII and VERMONT AND IDAHO has, in the case of LAWRENCE versus YAMAMUCHI, which is a HAWAII

case and in the dissent it cites the IDAHO opinion as including a general contractor and as a matter of fact, while HAWAII limited their interpretation to say that only the owner or lessee of a premises could be the proprietor or operator of the business there carried on and they completely disregarded those words "or other person" and the, there is a dissent in that case and the dissent quotes both the IDAHO case and the VERMONT case at PACKETT versus MOORETOWN CREAMERY 91 Vermont, page 97, for the proposition that the other two jurisdictions were identical language, would find that the general contractor be the proprietor of the business carried on and therefore, entitled to the immunity of the Workmens Compensation Statute.

THE COURT: You don't claim MORRISVILLE against the Act covers this situation, do you?

MR. MILLER: It does in this way, Your Honor. If a general contractor is primarily liable for Workmens Compensation to an injured employee of a sub-contractor, then it cannot be the general contractor is not entitled to the protection of the Act. He can't be both liable under the Act and liable in tort, too. If his liability is fixed by the Act, he must be afforded the protection of the Act and we -

THE COURT: Provided he elects to come within the Act.

MR. MILLER: Well, there is no election otherwise, Your Honor.

THE COURT: Well, all right. Absent any specific

employer-employee relationship between VERMONT CONSTRUCTION and these plaintiffs and where Workmens Compensation has been paid for the carrier by the sub-contractor, how do you claim that you can be held liable?

MR. MILLER: The legislature in defining the work --

THE COURT: Under the Workmens Compensation Act?

MR. MILLER: You would have a situation like this, Your Honor. Under MORROSEAU versus LEGAT, if a sub-contractor's employee is injured, he can look either to the General or to the Sub and he would elect, he could very well elect the General then in that case, I assume the Court will say if he elects you and you pay then we will give you immunity. That case was covered specifically in the BLUE RIDGE ELECTRIC COMPANY case and there, I believe first of all that was a First Circuit Opinion and there they said, you can't do that, it's not up to the injured workman to decide who is entitled to the immunity, it's up to the legislature to decide. When the legislature defines the employer, under the statutory employer definition, then the legislature has given that person immunity, not the workman who decides who he is going to take his benefits from and thereby confer immunity upon them. And that's our position, under MORRISSEAU versus LEGAT, if the General Contractor is primarily liable and can be made to pay benefits, exclusively, then he's entitled to the protection of the Act, whether he actually pays the benefits or whether the

sub-contractor payes the benefits and it is immaterial whether you are under the Act it confers your immunity and not whether you make any payment.

THE COURT: Well, I understand your position.

MR. MILLER: Right - and I would also point out to the Court that there is no duty owed under a theory of negligence from the VERMONT CONSTRUCTION COMPANY to any of the plaintiffs for the reason that the contract between the owner and VERMONT CONSTRUCTION COMPANY gives no rights to the plaintiff. The contract is for the purpose of carving out rights to the owner of the project and that if there is any provision in that contract that could possibly be construed as assertor for the benefits of the plaintiff, it would be the provision requiring VERMONT CONSTRUCTION COMPANY to have Workmens Compensation insurance.

THE COURT: Didn't your, didn't you require that?

MR. MILLER: In our sub-contract? Yes, we did and we incorporated in our sub-contract, all the terms and provisions that were in the general contract but we say the terms and provisions of the general contract were not made for the benefit of the plaintiff, nor were the plaintiffs a party to that contract. We say that -

THE COURT: Do you say that gives them the right to be negligent?

MR. MILLER: The negligence rests upon the breech of a duty, Your Honor, and while it might be a breach of

a duty to perform the contract as far as the owner is concerned, if the plaintiffs have no interest in that contract then it is no breach of a duty to them.

We say that under a common law, that was decided in the California case, JOHNSON versus CAL-WEST CONSTRUCTION COMPANY, 204ACA629, 679, excuse me, 22 CALIFORNIA REPORTER, 492 a 1962 case, with facts very similar to the case in point. That case held that the General Contractor was not liable to the heirs of a deceased employee of a sub-contractor, who was killed when he fell from an allegedly defective scaffold that was furnished, constructed and controlled by the sub-contractor. We say that -

THE COURT: You cite that in your Brief?

MR. MILLER: I am not sure that that particular case is, Your HOnor.

THE COURT: Well, let me, -

MR. MILLER: I could furnish it to you.

THE COURT: Well, I think the Reporter has a medical appointment he wants to fulfill at 4:30 so I will recess at this time but go further in the morning. I don't know about the third, --

MR. BRYAN: Your Honor, no evidence has been introduced against me. I guess that is proper because he hasn't had his case in -

THE COURT: The third-party claimant hasn't had an opportunity to do so.

MR. BRYAN: Right, so I don't think it is

right for me to make motions at this time.

THE COURT: Very well. I'll hear you further in the morning, Mr. Miller.

MR. MILLER: thank you.

THE COURT: I take it you have no Vermont Supreme Court hasn't spoken directly to the question?

MR. MILLER: Not precisely on this point, Your Honor.

THE COURT: How about... (Off the record).

(This trial then at 4:24 p.m., 9 June 1976 adjourned until 10 June 1976, at 9:23 a.m., at which time it was reconvened IN CHAMBERS, without the presence of the Jury)

THE COURT: I believe when we recessed yesterday we were presenting your arguments in response or with respect to a motion for a directed verdict, Mr. Miller and we want to have you complete the record in that respect.

MR. MILLER: Yes, Your Honor, if I may, to complete the record with regard to my motion for a directed verdict I would like to request the Court with respect to that portion of the motion that deals with a defense of Workmens Compensation on the basis of the General Contractor being a statutory employer to ask the Court to find, as a matter of law, that the work being done by the plaintiffs at the time of the accident, was an integral part of the business of building the hospital which the General Contractor was under contractural obligation to do. Now, with respect to the other grounds for my motion, I believe I had started to say that we believe

that the, with respect to the question of the principle contractor's liability to an employee of a sub-contractor whose injury is caused by a facility furnished or contracted for by the sub-contractor and actually erected by the sub-contractor, we believe that the common law is that a General Contractor may not be held liable for the death of an employee of the sub-contractor which resulted from a defect or a dangerous condition that was not supplied or constructed by the General Contractor and of which the General Contractor had no actualy knowledge. We believe that the common law is also that if the staging or the scaffolding was built and furnished by the sub-contractor and the general contractor did not direct the details or plans or method in which it was constructed or exercise any actual control over its construction, that the general contractor is not chargeable with any negligence on the part of the sub-contractor in the construction of the staging or scaffolding.

Further, we believe that the common law is that the general contractor has no duty to the employee of the - of a sub-contractor to maintain to change or to repair any facility that is supplied and erected by the sub-contractor for use of the sub-contractor's employees and the general contractor has no common law duty to an employee of the sub-contractor to inspect the facilities for the purpose of discovering any defect or ascertaining whether or not it is safe for use by the sub-contractor's employees.

We think that the general contractor is

HERMAN [illegible]
[illegible]

entitled to assume that the employees of the sub-contractor will perform those and that he will proceed in the ordinary use of his own senses and since there was no duty to give any notice or to warn them of any danger we think he himself actually unaware that - well, we cite to the Court the case of JOHNSON versus CAL-WEST CONSTRUCTION COMPANY 204 ACA 679 22 California Reporter, 492 which was a 1962 decision precisely on point with the case in question which held the general contractor was not liable to the heirs of a decedent employee of a sub-contractor who was killed when he fell from an allegedly defective scaffolding furnished, constructed and controlled by the sub-contractor.

THE COURT: That cite is 244 -

MR. MILLER: 204, Your Honor.

THE COURT: 204.

MR. MILLER: 204CACA679. Now, -

THE COURT: I don't have access to it. California Reporter 492, is there another citation on the next page?

MR. MILLER: No, Your Honor.

THE COURT: All right.

MR. MILLER: And I have two more grounds for my motion, Your Honor, the next to the last one would be that as a matter of law that the only evidence in this case, even viewing it in the light most favorable to the plaintiff or either of them, was that they assumed the risk of being seriously injured or being killed by failing to affix the life lines

which they themselves provided which the testimony is they knew were there and they were aware that if they did not have the life lines affixed to them and for some reason they either fell from the scaffolding or the scaffolding failed to support them they would be either killed or seriously injured, we say that as a matter of law, no jury acting reasonably, could fail to find that either of these plaintiffs, - could fail to find that either of these plaintiffs assumed the risk and therefore, should be barred from recovery.

Our last ground we say we concur with that argument raised by Brother AFFOLTER that the damages with regard to pecuniary loss would by necessity, be pure speculation as there is not sufficient evidence from which this Jury could establish to the reasonable probability required by the law, the actual pecuniary damage to any of the heirs and next of kin. That is the substance of my motion, Your Honor.

THE COURT: I want to make sure I got your requested finding, that you have said at the outset the work was being carried on in the course of the - -

MR. MILLER: that the work being done by the plaintiffs was an integral part of the construction of the hospital which was the business of the General Contractor by virtue of the contract that is now in evidence. I believe it is Plaintiff's #24, between the General Contractor and the owner. If I might include that I argued assumption of risk as a matter of law, I think that while contributory negligence is ordinarily a question for the jury to be weighed and perhaps

a portion for comparative negligence is applicable. I would say that the - no jury, acting reasonably would be justified in finding that these plaintiffs were not contributorily negligent to a greater extent than fifty percent.

THE COURT: Anything else?

MR. BRYAN: I think my motions come later.

MR. WOLFE: Do you want to have me respond?

THE COURT: Yes, go ahead.

MR. WOLFE: With regard to the Workmens Compensation defense it is the belief that we supplied to the Court the case that the Vermont statutes and the HAWAII, at least I am not familiar with it. The statute seems to contemplate the owner or lessees of the property would have responsibility for Workmens Compensation benefits and it is conceivable that they might not, might be held immune, although there hasn't been any finding to that extent in either of these jurisdictions. In the instant case the principle business to be carried on on the property was that of a hospital and in the Hawaiian case, here referred to from dissent, the point of view the principle business to be carried on there was a hotel and both instances, the principle, or the prime contractor in that instance, the prime contractor was held to be supposed to be, strike that, the prime contractor was held to be exposed to a third-party suit. Apparently there are only three jurisdictions with like statutes. I think if the legislature of the State of Vermont meant to make the third-party prime contractor immune from liability suits where they are also

liable in, for compensation, they would have spelled it out. It doesn't take that much extra wordage to put it in the statute and as it stands now, the state of the law at least in this State is that as far as I can see is that they are exposed to this law suit.

I did put in the possibility and I am not going to, because there is a difference whether New York law applied or not if, even if this argument wasnt upheld, which I think it should be, New York law is the, that is the forum where the compensation was made and that is the forum where the employees were hired, that was the place of the contract. The Vermont statute says that the State for outside employees where they are employed, the law of that State is applied. In the State of New York it is specifically spelled out in the statute that the prime contractor is subject to liability. So that is the argument on that. As far as the other arguments are concerned, even if the common law were as it was ennunciated there is a contractural obligation here. There is also a statutory obligation here to the, on the OSHA regulations making the prime contractor jointly liable here for their negligence with the sub-contractor for injuries to the employees of the sub-contractor.

THE COURT: Is there a specific provision or are you referring to the obligations in the safety standards that are set out?

MR. WOLFE: The obligations set forth in the safety standards which were enacted pursuant to the Labor

Law.

THE COURT: The motion of the Defendant, VERMONT CONSTRUCTION COMPANY for a directed verdict of no liability, is denied. I don't think there is any more to deal with at this point. We will proceed with the evidence in the court room.

(Recessed from 9:36 a.m. IN CHAMBERS until 9:40 a.m. at which time it was reconvened in the court room with the Jury present).

THE COURT: The defendant, New Bedford Cordage may proceed.

MR. ERDMANN: Thank you, Your Honor.

ALBERT MONACO, having been recalled as a witness by the defense, was warned that he was still under oath and further testified on his oath as follows:

DIRECT EXAMINATION BY MR. ERDMANN:

Q. Mr. Monaco, would you explain to the Jury what happens to rope after it comes off the machines which is winding the rope or manufacturing the rope. What is done with that afterwards?

A. Well, the rope is tested for quality control purposes to be sure that it meets all the standards for manufacture and all those standards of the Cordage INstitute in TR 605. TR-605 is the Government's specifications covering manila rope. It is then if it is found to be satisfactory. It's wound, re-wound on the 600 and the 1200-foot coils.

Q. Now is this winding into the coils done with an operator

THE COURT: Mr. Miller?

MR. MILLER: Yes, Your Honor. At the close of all the evidence, VERMONT CONSTRUCTION COMPANY would renew its motion for a directed verdict against the plaintiffs on all grounds as previously stated and in summary, to refresh the Court's recollection, that first grounds was that we were a statutory employer entitled to the defense set forth in Workmens Compensation ACt, which states that relief under the Act, is exclusive of an, other remedy and including a tort action of this kind and we further stated that any obligations that the general contractor were not innured to the benefit of the plaintiffs and that there's not any act of actionable negligence charged against Vermont Construction which could serve as the proximate cause of the injury to either plaintiff which was not either an act of overwhelming contributory neg ligence on that plaintiff's part or an act of assumption of - the risk on that plaintiff's part which, as a matter of law, would bar recovery.

We again make reference to the cases that we cited to the Court in arguing our Motion for Directed Verdict at the close of the plaintiff's case.

THE COURT: The Court will deny the Plaintiff's Motion for a directed verdict against New Bedford Cordage and Reynolds and Son. The New Bedford Cordage motion for a directed verdict is denied. The Defendant, Vermont Construction motion for a directed verdict is denied. The Court will recess at this time, Mr. Vesper, if we need you, we'll ask you to come in

HERMAN J. VESPER
OFFICIAL COURT REPORTER
P. O. BOX 143
BUTLER, VERMONT 05701

Chambers but the Court will conduct the charge conference at this time in chambers. (11:40 a.m.)

(At 1.34 p.m. court was reconvened in open court with the Jury present)

THE COURT: Mr. WOLFE, you may proceed to make your closing argument. MR. WOLFE: If it Please the Court, ladies and gentlemen of the Jury. At this point in time after quite a lengthy trial, we have the opportunity of summarizing the evidence to you.

Now, it's been a long trial and I notice that you have been especially attentive really to this whole matter and really, some parts of it aren't especially entertaining or enlightening and at least maybe enlightening but not entertaining, let me put it that way. But in any event from my observation you have been wonderfully cooperative with everybody.

Now, my purpose here at this time is to try to summarize the facts and at the same time that I recall facts to you, it's not my recollection that's going to count here, it's going to be your own recollection of the facts, as they have been produced in evidence. So, anything I say that differs with your own thoughts about what transpired, naturally you are going to take your own recollection and that is the law and that is as it should be.

You do have the sole job here of deciding the disputed facts and applying those facts then to the law and that brings me to my second point here.

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Unidentified Exhibit.

CONSTRUCTION CONTRACT

BETWEEN

VERMONT CONSTRUCTION INC.

AND

JOHNSON INDUSTRIAL PAINTING CONTRACTORS

319

Unidentified Exhibit.

AGREEMENT made this 1. day of April

19 70 (nineteen and seventy) between VERMONT CONSTRUCTION INC., hereinafter called the Contractor

and Johnson Industrial Painting Contractors hereinafter called the Subcontractor, at

P.O. Box 865, Plattsburgh, N.Y. 12901, U.S.A. tel. 518-561-6262

WHEREAS by an agreement made the 16th day of March

19 70 between Northeastern Vermont Regional Hospital Inc.

hereinafter called the Owner and Vermont Construction Inc., the Contractor did agree to provide all the materials and to perform all the work shown on the drawings and described in the specifications titled Northeastern Vermont Regional Hospital project No. 1355

and prepared by Freeman, French, Freeman Architect/Engineer and to perform everything required and demanded by the general conditions of the contract, the specifications, the drawings and the addenda;

WHEREAS the Subcontractor has agreed to perform a certain portion of said work and to supply the materials required for this work, as stated hereunder;

THIS AGREEMENT STIPULATES WHAT FOLLOWS:

ARTICLE I. The Subcontractor agrees to supply all the materials and to perform all the work described in article II of the present contract and concerning:

Northeastern Vermont Regional Hospital
(BUILDING)

Northeastern Vermont Regional Hospital Inc.
(NAME OF THE OWNER)

St.Johnsbury, Vermont, U.S.A.
(LOCATION)

in accordance with the general conditions, drawings and specifications prepared by the Architect/Engineer. Said general conditions, drawings and specifications form part of the contract between the Contractor and the Owner and form also part of the present contract between the Contractor and the Subcontractor.

ARTICLE II. The Subcontractor and the Contractor agree that the materials to be supplied and that the work to be performed by the Subcontractor are:

The subcontractor agrees to provide all the labour, materials and equipment required to execute all the work concerning painting and wall covering, according to drawings, specifications, addenda Nos. 1, 2 and 3, and alternate No. 2.

All the work will be executed under the superintendance of a qualified foreman and in complete cooperation with the other trades.

ARTICLE III. The Subcontractor agrees to perform his work in accordance with the schedules established monthly under the critical path method by the Contractor and posted on the work site.

The Subcontractor agrees to examine the schedule regularly on his own from the 20th day of April 19 70

This stipulation applies equally to the changes and additional works, ordered according to article XVI of the present contract.

In case of delay in the performance of the work or in the supplying of the materials, the instalments hereunder specified will be heldback by the Contractor until the Subcontractor has conformed to the schedule.

ARTICLE IV. The Contractor will pay to the Subcontractor for the performance of his work the sum of

THIRTY-TWO THOUSAND, FIVE HUNDRED DOLLARS - All taxes included ($ 32,500.00)

in legal currency at the location of the building, taking into account all increases and deductions agreed upon and concerning changes or additional work, the whole in the matter described in article VI of the present contract.

ARTICLE V. The drawings and specifications which form part of the contract made between the Owner and the Contractor will bind and oblige the Subcontractor for that portion of the work mentioned in the present contract and the general conditions of the contract made between the Contractor and the Owner will bind and oblige both the Contractor and the Subcontractor inasmuch as they are applicable to the present contract. It is agreed between the parties that any litigation concerning the work to be performed or the materials to be supplied under the present contract will be settled in accordance with the general conditions of the contract between the Owner and the Contractor if said contract contains a procedure for the settlement of these litigations; otherwise any litigation between the Contractor and the Subcontractor will be submitted to the Architect/Engineer and the decision will be final.

Unidentified Exhibit.

ARTICLE VI. The Contractor will pay the Subcontractor in the currency of the location of the building and as follows: instalments representing ..... percent of the value of the work terminated and of the materials incorporated by the Subcontractor at the end of the month preceding will be paid to the Subcontractor by the Contractor on or about the 15th of each month providing that separate estimates for said work and materials are transmitted to the contractor before the 25th of preceding month with the sworn declaration of the Subcontractor in the form demanded by the Contractor and providing also that the Contractor has been paid by the Owner. The balance of this percentage being .15%... percent will be paid 35 days after the incorporation of the materials, the complete termination of the work and the full acceptance of the Architect/Engineer and the Owner. **2% DISCOUNT IF PAYED AT TEN (10) DAYS.

The Subcontractor agrees to furnish the Contractor with such partial releases and waivers of lien from his materialmen and creditors as the Contractor may request from time to time on labor and/or material and upon completion of subcontract furnish final releases and waivers of lien at the time of final payment.

ARTICLE VII. The Subcontractor will maintain full Workmen Compensation coverage and insurances for an amount sufficient to cover any claims for property damages and personal injuries including death suffered by any person as a result of his operation under the present contract. Certificates establishing the issue of these insurances will be transmitted to the Contractor who will decide if the amount of these insurances is sufficient. If the Owner demands it, the Contractor will cause these insurances to be issued for the whole contract and the Subcontractor will pay his share of the premiums, said share to be determined by the underwriting department of the insurance company which would issue said insurances to the Contractor.

ARTICLE VIII. The Contractor will maintain fire insurances for the portion of the work performed under the present contract and for which he has paid the Subcontractor. The Subcontractor will maintain fire insurances for the portion of the work which has not been paid and will transmit the certificates of these insurances to the Contractor. In any event the Subcontractor will always be responsible for that portion of the work which is not paid.

ARTICLE IX. The Subcontractor, if required by the Contractor, will provide a bond or a warranty for the complete performance of the contract and also to guarantee the payment of labor and materials. If the Contractor, in his request of a tender to the Subcontractor, demands this bond or warranty, the Subcontractor will pay its costs, otherwise its costs will be paid by the Contractor.

ARTICLE X. The Subcontractor and the Contractor, in their own name and in the name of their heirs, executors, administrators, successors and transferees, undertake by the present to comply fully with every clause of the present contract.

ARTICLE XI. The Subcontractor undertakes expressly to pay all the damages that could be caused to the Contractor as a result of defects in his work or as a result of his default to terminate according to the schedules that portion of the work mentioned in the present contract. These damages might be direct or indirect, they might result from the Law in general or from the special conditions of the contract between the Contractor and the Owner. More especially the Subcontractor will be responsible for any amount that the Contractor might be obliged to pay to the Owner as a penalty for delay or for defects and also for the interest on the sums which would be withheld by the Owner as a result of said delay or defects. It is especially agreed that the Contractor will holdback the amount of these damages on any balance that could be due by the Contractor to the Subcontractor.

Should the Contractor withhold thus an amount under the present clause, the Subcontractor authorizes the Owner to pay the amount of this holdback without any proof of payment and the Subcontractor releases the Owner of any obligation that he could have as a result of this payment.

ARTICLE XII. Should the Employees of the Subcontractor declare a strike or should the Subcontractor be put into bankruptcy or make a voluntary assignment or should the Subcontractor violate any clause of the present contract or should the Subcontractor abandon the performance of his work for seven (7) days, the Contractor will, at his option, annull the present contract and will enter into a new contract with another Subcontractor without any delay or notice and the Subcontractor will pay to the Contractor any increase which the Contractor might have to pay to the new Subcontractor and the Subcontractor will be responsible towards the Contractor for any damages that the Contractor might suffer as a result of the circumstances here above described.

The Subcontractor waives any right that he could have to any kind of a lien on any property of the Owner.

ARTICLE XIII. No part of this work can be performed by another Subcontractor without the written consent of the Contractor.

ARTICLE XIV. The Subcontractor will not transfer his rights, in whole or in part, to the payments which might become due under the present contract and it is agreed that any such transfer would be null towards the Contractor and would be a cause of cancellation of the present contract at the option of the Contractor.

ARTICLE XV. The Subcontractor with his first and last estimate will submit a document from the Workmen Compensation Act Authority to the effect that he has paid all his dues and that said Authority has been advised of the value and the nature of the present contract.

ARTICLE XVI. Absolutely no modification or addition to the work specified in the present contract will be accepted by the Contractor unless it is authorized by writing by Messrs. MARCEL PILON or PIERRE BEETZ.

ARTICLE XVII. Compliance with Federal, State and Local Laws. The Subcontractor warrants that in the performance of work under this subcontract it has complied with or will comply with all applicable federal, state and local laws and ordinances and all lawfull orders, rules and regulations thereunder, including, but not by way of limitation, the federal Fair Labor Standards Act, as amended.....

...the State of Vermont Employment Practices Act and the State of Vermont Labor Relations Act.

ARTICLE XVIII. Nondiscrimination in Employment. In connection with the performance of work under this subcontract, the Subcontractor agrees not to discriminate against any employee or applicant for employment because of race, religion, color or national origin.

ARTICLE XIX. The Subcontractor shall at all times keep the construction area, including storage areas used by him, free from waste and rubbish created by him during the progress of his work and agrees to promptly clean up such rubbish or waste created by him. If the Subcontractor refuses or fails to perform this cleaning, the Contractor shall have the right and power to perform said cleaning and the Subcontractor agrees to repay the Contractor the actual cost of said cleaning work plus .....15%..... percent to cover supervision, insurance and overhead.

ARTICLE XX. The Subcontractor agrees that monies received for the performance of this contract shall be used primarily for labor and material entering into this work and said monies shall not be diverted to satisfy obligations of the Subcontractor on other contracts.

ARTICLE XXI. The Subcontractor shall provide at his own expense such shops and storage sheds and offices as are necessary for the performance of this subcontract and shall remove same and thoroughly clean premises at the completion of the work.

IN WITNESS WHEREOF, the parties have signed at the date and place mentioned at the beginning of the present agreement.

Witnesses:

Agnes Sirois

Charlotte Lamille

VERMONT CONSTRUCTION INC.
(Contractor)

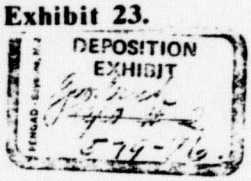
per: .....

JOHNSON INDUSTRIAL PAVING CORPORATION
(SUBCONTRACTOR)

per: .....

PAUNARD F1600

Government Exhibit 23.



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N. V. R. H.
St. Johnsbury, Vt.
Page 1

NOTICE TO CONTRACTORS

Sealed Bids, in duplicate for the construction of the Northeastern Vermont Regional Hospital, Inc., St. Johnsbury, Vermont will be received at the Office of the Administrator, Brightlook Hospital, St. Johnsbury, Vermont, until 3:00 p.m. E.S.T. February 23, 1970 and then publicly opened and read aloud in the conference room, (4th Floor).

Plans, Specifications, and Proposal Blanks: Complete sets of Plans and Specifications for the use of bidders will be on file for examination in the offices of F. W. Dodge Corp., 31 St. James Avenue, Boston, Massachusetts; 16 Russell Road, Albany New York; and 206-A Mammoth Road, Manchester, New Hampshire; and Freeman.French.Freeman, Architects, 158 Bank Street, Burlington, Vermont. A certified check made payable to Freeman.French.Freeman for $100.00 must accompany application for each set of Plans and Specifications. Any bidder upon returning his Plans and Specifications in good condition within fifteen days after opening of bids will be refunded his deposit in full.

Proposal Guarantee: Bids shall be accompanied by a certified check or bid bond made payable to Northeastern Vermont Regional Hospital Inc., St. Johnsbury, Vermont for 5% of the total bid. Checks will be held by the Hospital until the Contract has been awarded and the successful bidder has qualified. No bidder may withdraw his bid for a period of 45 days after date of opening bids.

Bonds: A Performance Bond and a Labor and Material Payment Bond, each equal to 100% of the amount of the contract, will be required of the successful bidder.

Interpretation: No interpretation of the meanings of the Plans, Specifications or other Contract Documents will be made to any bidder orally. Each request for such interpretation should be in writing addressed to the Architects, Freeman.French.Freeman, 158 Bank Street, Burlington, Vermont, and to be given consideration, must be received at least four (4) days prior to the date fixed for the opening of bids. Any and all such interpretations and supplementive instructions will be in the form of written addenda to the Specifications which, if issued, will be mailed by certified mail or registered mail with return receipt requested to all prospective bidders not later than three (3) days prior to the date fixed for the opening of bids. Failure of any bidder to receive any such addendum or interpretation shall not relieve any bidder from any obligation under his bid as submitted. Any addenda so issued shall become part of the Contract Documents.

*

BEST COPY AVAILABLE

Government Exhibit 23.

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N. V. R. H.
St. Johnsbury, Vt
Page 2

NOTICE TO CONTRACTORS

AWARD: The Northeastern Vermont Regional Hospital for St. Johnsbury, Vermont reserves the right to reject any and all bids to make the award in the best interest of the hospital.

Directions for Mailing Bids: An envelope containing bids, guarantee, etc., must be sealed, marked and address as follows:

(Mark in lower left hand corner)

Bids for Construction of
Northeastern Vermont Regional Hospital
St. Johnsbury, Vermont

Address

Mr. Robert W. Hall
Administrator
Brightlook Hospital
St. Johnsbury, Vermont

FREEMAN, FRENCH, FREEMAN
Architects
[illegible]

Government Exhibit 23.

FPC-343
Dec. 6-61

Form Approved
Budget Bureau No. 68-R312

GENERAL CONDITIONS

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Government Exhibit 23.

1. Definitions.—The terms "Owner," "Architect," "State Agency," and "Surgeon General" as used herein are defined as set forth below, unless reference is made to another location for definition. They are treated throughout the specifications as if each were of the singular number and masculine gender.

(a) The terms "Owner" and "Architect" are those defined as such in the General Requirements Section of the Specification.

(b) The term "State Agency" means the agency designated by the State as the sole agency for administering the State plans or, as the sole agency for supervising the administration of the State plans approved by the Surgeon General for the following construction grant programs: Hospital and Medical Facilities Survey and Construction (Hill-Burton), Hospital and Medical Facilities under Accelerated Public Works, Facilities for the Mentally Retarded and Community Mental Health Centers, and shall include all authorized representatives of the State agency.

(c) The term "Surgeon General" means the Surgeon General of the U.S. Public Health Service, and shall include his authorized representatives.

2. Contract Documents.—(a) The Contract Documents consist of the Agreement, the Drawings and Specifications, including all addenda and alterations made in the documents prior to their execution.

(b) The Contract Documents shall be signed by the Owner and Contractor in as many original counterparts as may be mutually agreed.

(c) Anything called for by one of the Contract Documents and not called for by the others shall be of like effect as if required or called for by all. In case of discrepancies between the Contract Documents the specifications shall take precedence over the drawings, and the Agreement shall take precedence over the drawings and specifications. Any discrepancies between the Contract Documents shall be called to the attention of the Architect before proceeding with work affected thereby.

3. Detail Drawings and Instructions.—(a) The Contractor will be furnished additional instructions and detail drawings as may be necessary to carry out the work included in the contract. The additional drawings and instructions, thus supplied to the Contractor, shall be consistent with the Contract Documents, true developments thereof, and shall be so prepared that they can be reasonably interpreted as a part thereof. The Contractor shall carry out the work in accordance with the additional detail drawings and instructions.

(b) The Contractor and the Architect will prepare, jointly, (1) a schedule fixing the dates at which special detail drawings will be required; and (2) a schedule fixing the respective dates for the submission of shop or setting drawings, the beginning of manufacture, testing and installation of materials, supplies, and equipment, and the completion of the various parts of the work, each such schedule to be subject to change from time to time in accordance with the progress of the work.

4. Access to the Work.—The Architect, the Surgeon General and, in the case of such programs as they administer under 1(b) page 2, the State agency and their authorized representatives shall have access at all times to the work for inspection wherever it is in preparation or progress, and the contractor shall provide proper facilities for such access and inspection.

5. Supervision.—All work shall be done under the supervision of the Architect designated by the Owner. The Architect shall determine the amount, quality, acceptability, and fitness of all parts of the work, shall interpret the Specifications, Contract Documents, and any Extra Work Orders, and shall decide all other questions in connection with the work. The Architect shall have no authority to approve or order changes in the work which alter the terms or conditions of the contract. Upon request, the Architect shall confirm in writing any oral order, direction, requirement, or determination.

6. Architect's Decisions.—(a) It shall be the responsibility of the Architect to make written decisions in regard to all claims of the Owner or Contractor and to interpret the Contract Documents on all questions arising in connection with the execution of the work.

(b) Except as otherwise specified, all the Architect's decisions or interpretations of contract requirements are subject to arbitration.

(c) If the Architect fails to make a written decision or written interpretation of the contract requirements on any question within ten days after written request for same by either party to the contract, either part, may then demand arbitration, in which event, later decision by the Architect shall not stop the arbitration proceedings except with the mutual consent of both parties to the contract.

7. Arbitration.—(a) It is mutually agreed that all disputes arising in connection with this contract shall be submitted to arbitration in accordance with the provisions of the current Standard Form of Arbitration Procedure of the American Institute of Architects and that all findings of fact by the arbitrators under this agreement shall be conclusive and binding on both parties. It is further mutually agreed that the decision of the arbitrators shall be a prior condition to any right of legal action which either party to the contract may have against the other.

(b) The work under this contract shall not be stopped or delayed in any way during the arbitration proceedings except by written mutual consent of both parties to the contract, and such mutual consent shall stipulate whether extension of the time for completion of the contract will be authorized by such stoppage or delay.

(c) Demand for arbitration in connection with any dispute shall be filed in writing with the Architect and with the other party to the contract. Any demand for arbitration shall be made within thirty days after the dispute has arisen if practicable, but, in any event, no demand for arbitration shall be made after the date of final payment except in the case of a dispute arising in connection with any guarantee provisions of the Contract Documents.

(d) The arbitrators hereunder shall have authority to award to the party whose contentions are approved as being in conformity with contract requirements such sums as they, or a majority of them, consider is proper to compensate the injured party for any loss in connection with the proceedings; and, if they find that the arbitration proceedings were demanded without reasonable cause, they may in addition award the injured party damages for delay, unless precluded by agreement between the contracting parties before arbitration. The arbitrators shall set their own compensation and determine the total amount of such compensation and other costs and expenses of the proceedings incurred by them, unless otherwise agreed prior to the proceedings, and shall assess the total of the costs of the proceedings upon either or both parties to the contract in such proportions as they, or a majority of them, may approve.

8. Notice.—The term "Notice" as used herein shall mean and include all written notices, demands, instructions, claims, approvals, and disapprovals required to obtain compliance with contract requirements. Any written notice by either party to the contract shall be sufficiently given if delivered to or at the last known business address of the person, firm, or corporation constituting the other party to the contract, or to his, their, or its duly authorized agent, representative, or officer; or when enclosed in a postage prepaid envelope addressed to such last known business address and deposited in a United States mail box.

9. Conditions at Site or Building.—(a) Bidders should visit the site and shall be responsible for having ascertained pertinent local conditions such as location, accessibility, and general character of the site or building, the character and extent of existing work within or adjacent to the site, and any other work being performed thereon at the time of the submission of his bid.

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(b) If, in the performance of the contract, subsurface or latent conditions at the site are found to be materially different from those indicated by the drawings and specifications, or unknown conditions of an unusual nature are disclosed differing materially from the conditions usually inherent in work of the character shown and specified, the attention of the Architect shall be called immediately to such conditions before they are disturbed. Upon such notice or upon his own observation of such conditions, the Architect shall promptly make such changes in the drawings and specification as he finds necessary to conform to the different conditions, and any increase or decrease in the cost of the work resulting from such changes shall be adjusted as provided under Changes in Work.

10. Laws, Permits, and Regulations.—(a) The Contractor shall obtain and pay for all licenses and permits and shall pay all fees and charges for connection to outside service and use of property other than the site of the work for storage of materials or other purpose.

(b) The Contractor shall comply with all laws, ordinances, regulations, and building code requirements applicable to work hereunder unless in conflict with contract requirements. If the Contractor ascertains at any time that any requirement of this contract is at variance with applicable laws, ordinances, regulations, or building code requirements, he shall promptly notify the Architect, and any necessary adjustment of the contract shall be made as specified under Changes in Work.

11. Explanation to Bidders.—No oral explanation in regard to the meaning of the drawings and specifications will be made and no oral instructions will be given before the award of the contract. Discrepancies, omissions, or doubts as to the meaning of drawings and specifications should be communicated in writing to the Architect for interpretation. Bidders should act promptly and allow sufficient time for a reply to reach them before the submission of their bids. Any interpretation made will be in the form of an addendum to the specifications which will be forwarded to all bidders and its receipt by the bidder should be acknowledged on the Bid Form.

12. Preparation and Submission of Bids.—(a) The bidder is required to bid on all alternates or on all items called for in the Bid Form, except that if alternates are called for on a type or method of construction as to which the bidder does not desire to bid he may insert the words "No bid" in the space provided for prices on such alternate type or method of construction. In such case, if it is determined to use such alternate type or method of construction, the fact that the cost of the type or method bid on by the bidder may be lower than that chosen shall not constitute the basis of a claim by the bidder that the contract shall be awarded to him. In the case the bidder desires to bid on an alternate he shall set forth in the space provided therefor the amount to be added to or deducted from the Base Bid. If an alternate price called for does not involve a change in price, the bidder shall so indicate by writing the words "No change" in the space provided.

(b) Bids shall be submitted on the forms furnished, or copies thereof, and shall be signed in ink. Erasures or other changes in a bid must be explained or noted over the signature of the bidder. Bids containing any conditions, omissions, unexplained erasures or alterations, or items not called for in the proposal, or irregularities of any kind may be rejected by the Owner as being incomplete.

(c) Each bid must give the full business address of the bidder and be signed by him with his usual signature. Bids by partnerships must furnish the full name of all partners and must be signed in the partnership name by one of the members of the partnership or by an authorized representative, followed by the signature and designation of the person signing. Bids by corporations must be signed with the legal name of the corporation, followed by the name of the State of incorporation and by the signature and designation of the president, secretary, or other person authorized to bind it in the matter. The name of each person signing shall also be typed or printed below the signature. A bid by a person who affixes to his signature the word "President," "Secretary," "Agent," or other designation, without disclosing his principal, may be held to be his individual signing. When requested by the Owner, satisfactory evidence of the authority of the officer signing in behalf of the corporation shall be furnished.

(d) Bids shall be enclosed in a sealed envelope which shall be marked and addressed as required by Directions for Mailing on the Bid Form.

13. Receipt and Opening of Bids.—(a) Bids will be opened publicly at the time and place stated in the invitation for bids. The officer whose duty it is to open them will decide when the specified time has arrived and no bid received thereafter will be considered. No responsibility will attach to any officer for the premature opening of a bid not properly addressed and identified.

(b) Telegraphic bids will not be considered, but modifications by telegraph of bids already submitted will be considered if received prior to the hour set for opening.

14. Withdrawal of Bids.—Bids may be withdrawn on written or telegraphic request received from bidders prior to the time fixed for opening. Negligence on the part of the bidder in preparing the bid confers no right for the withdrawal of the bid after it has been opened.

15. Bidders Present.—At the time fixed for the opening of bids, their contents will be made public for the information of bidders and others properly interested who may be present, either in person or by representative.

16. Award of Contract.—(a) The contract will be awarded as soon as possible to the responsible bidder submitting the lowest acceptable bid.

(b) The Owner reserves the right to waive any informality in bids received when such waiver is in the interest of the Owner.

(c) The Owner further reserves the right to accept any item in the bid without accepting the bid in its entirety, unless the bidder qualifies such bid by special limitation, and to make the award to the bidder whose combination of the base bid and accepted alternates is low.

(d) Each bidder shall be prepared, if so requested by the Owner, to present evidence of his experience, qualifications, and financial ability to carry out the terms of the contract.

17. Rejection of Bids.—The Owner reserves the right to reject all bids, when such rejection is in the interest of the Owner, and to reject any or all bids failing to comply with the conditions specified in paragraph 16.

18. Contract Security.—The successful bidder must deliver to the Owner an executed Performance Bond in an amount at least equal to 100 percent (100%) of the accepted bid as security for the faithful performance of the contract, and also must deliver to the Owner a separate executed Payment Bond in an amount at least equal to 100 percent (100%) of the accepted bid as security for the payment of all persons performing labor and furnishing materials in connection with this contract. The sureties of all bonds shall be such surety company or companies as are approved by the Owner and as are authorized to transact business in the State where the proposed project is located. The bonds must be approved by the Owner prior to execution of the formal contract. On contracts for materials and equipment only, involving no labor on the site, Performance and Payment Bonds will not be required unless expressly so stated.

19. Contractor's and Subcontractor's Insurance.—(a) The contractor shall not commence work under this contract until he has obtained all the insurance required hereunder and such insurance has been approved by the Owner, nor shall the Contractor allow any subcontractor to commence work on his subcontract until all similar insurance required of the subcontractor has been so obtained and approved. Approval of the insurance by the Owner shall not relieve or decrease the liability of the Contractor hereunder.

(b) *Compensation and Employer's Liability Insurance.*—The Contractor shall take out and maintain during

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the life of this contract the statutory Workmen's Compensation and Employer's Liability Insurance for all of his employees to be engaged in work on the project under this contract and, in case any such work is sublet, the Contractor shall require the subcontractor similarly to provide Workmen's Compensation and Employer's Liability Insurance for all of the latter's employees to be engaged in such work.

(c) *Bodily Injury Liability and Property Damage Liability Insurance.*—The contractor shall take out and maintain during the life of this contract such Bodily Injury Liability and Property Damage Liability Insurance and Automobile Bodily Injury Liability and Property Damage Liability Insurance as shall protect him and any subcontractor performing work covered by this contract from claims for damages for personal injury, including accidental death, as well as from claims for property damage, which may arise from operations under this contract, whether such operations be by himself or by any subcontractor or by anyone directly or indirectly employed by either of them, and the amounts of such insurance shall not be less than—

(1) Bodily Injury Liability Insurance, in an amount not less than One Hundred Thousand Dollars ($100,000.00) for injuries, including wrongful death to any one person, and subject to the same limit for each person in an amount not less than Three Hundred Thousand Dollars ($300,000.00) on account of one accident.

(2) Property Damage Insurance in an amount not less than Fifty Thousand Dollars ($50,000.00) for damages on account of any one accident, and in an amount not less than One Hundred Thousand Dollars ($100,000.00) for damages on account of all accidents.

(d) *Owner's Protective Liability Insurance.*—The contractor shall take out and furnish to the Owner and maintain during the life of this contract complete Owner's Protective Liability Insurance in amounts as specified in paragraph 19(c), above, for Bodily Injury Liability Insurance and for Property Damage Liability Insurance.

(e) *Fire Insurance.*—The Contractor shall insure the building or other work included in this contract against loss or damage by fire, and against loss or damage covered by the standard extended coverage insurance endorsement, in an insurance company or companies acceptable to the Owner, the amount of the insurance at all times to be at least equal to the amount paid on account of work and materials and plus the value of work or materials furnished or delivered but not yet paid for by the Owner. The policies shall be in the names of the Owner and the Contractor, as their interests may appear, and certificates of the insurance company as to the amount and type of coverage, terms of policies, etc., shall be delivered to the Owner before monthly partial payments are made. The policy shall provide for the inclusion of the names of all other contractors, subcontractors, and others employed on the premises as aforesaid, and shall stipulate that the insurance companies shall have no right of subrogation against any contractors, subcontractors, or other parties employed on the premises for any work, building alteration, construction, or erection to the described property.

20. Accident Prevention.—Precaution shall be exercised at all times for the protection of persons (including employees) and property. The safety provisions of applicable laws, building and construction codes shall be observed. Machinery, equipment, and all hazards shall be guarded or eliminated in accordance with the safety provisions of the latest edition of the Manual of Accident Prevention in Construction, published by the Associated General Contractors of America, to the extent that such provisions are not in contravention of applicable law.

21. Subcontracts.—Nothing contained in the specifications or drawings shall be construed as creating any contractual relationship between any subcontractor and the Owner. The divisions or sections of the specifications are not intended to control the Contractor in dividing the work among subcontractors or to limit the work performed by any trade.

(b) The Contractor shall be as fully responsible to the Owner for the acts and omissions of subcontractors, and of persons employed by them, as he is for the acts and omissions of persons directly employed by him.

(c) The Contractor shall be responsible for the coordination of the trades, subcontracts, and material lists, and not the Owner.

(d) The Contractor shall, without additional expense to the Owner, utilize the services of specialty subcontractors on those parts of the work which are specified to be performed by specialty subcontractors.

(e) The Owner or Architect will not undertake to settle any differences between the Contractor and his subcontractors or between subcontractors.

(f) The Contractor shall ensure appropriate provisions to be inserted in all subcontracts relative to the work to bind subcontractors to the Contractor by the terms of the General Conditions and other Contract Documents insofar as applicable to the work of subcontractors and to give the Contractor the same power as regards terminating any subcontract that the Owner may exercise over the Contractor under any provisions of the Contract Documents.

22. Protection of Work and Property.—The Contractor shall at all times safely guard the Owner's property from injury or loss in connection with this contract. He shall at all times safely guard and protect his own work, and that of adjacent property (as provided by law and the Contract Documents) from damage. All passageways, guard fences, lights, and other facilities required for protection by State or municipal law and regulations and local conditions, must be provided and maintained.

23. Responsibility of Contractor To Act in Emergency.—In case of an emergency which threatens loss or injury of property, and/or safety of life, the Contractor shall act, without previous instructions from the Owner or Architect, as the situation may warrant. He shall notify the Architect thereof immediately thereafter. Any compensation claimed by the Contractor, together with substantiating documents in regard to expense, shall be submitted to the Owner through the Architect and the amount of compensation shall be determined by agreement or arbitration.

24. Separate Contracts.—The Owner plans to award other contracts in connection with the project, the work under which will proceed simultaneously with the execution of this contract. The Contractor shall coordinate operations with those of other contractors. Cooperation will be required in the arrangement for the storage of materials and in the detailed execution of the work. The Contractor, including his subcontractors, shall keep himself informed of the progress and the detail work of other contractors and shall notify the Architect immediately of lack of progress or defective workmanship on the part of other contractors, where such delay or such defective workmanship will interfere with his own operations. Failure of a Contractor to keep informed of the work progressing on the site and failure to give notice of lack of progress or defective workmanship by others shall be construed as acceptance by him of the status of the work as being satisfactory for proper coordination with his own work.

25. Mutual Responsibility of Contractors.—If the Contractor or any of his subcontractors or employees cause loss or damage to any separate contractor on the work, the Contractor agrees to settle with such separate contractor by agreement or arbitration, if he will so settle. If such separate contractor sues the Owner, on account of any loss so sustained, the Owner shall notify the Contractor, who shall indemnify and save harmless the Owner against any expenses or judgment arising therefrom.

26. Use of Premises and Removal of Debris.—The Contractor expressly undertakes at his own expense—

(a) To take every precaution against injuries to persons or damages to property;

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(e) To comply with the regulations governing the condition of premises which are occupied and to perform his contract in such a manner as not to interrupt or interfere with the operation of the hospital or other health facility;

(c) To perform any work necessary to be performed after regular working hours or on Sundays or legal holidays, without additional expense to the Owner;

(d) To store his apparatus, materials, supplies, and equipment in such orderly fashion at the site of the work as will not unduly interfere with the progress of his work or the work of any other contractors;

(e) To place upon the work or any part thereof only such loads as are consistent with the safety of that portion of the work;

(f) Frequently to clean up all refuse, rubbish, scrap materials, and debris caused by his operations, to the end that at all times the site of the work shall present a neat, orderly, and workmanlike appearance;

(g) To effect all cutting, fitting, or patching of his work required to make the same conform to the plans and specifications, and except with the consent of the Architect not to cut or otherwise alter the work of any other contractor.

(h) Before final payment to remove all surplus material, false work, temporary structures, including foundations thereof, plant of any description, and debris of every nature resulting from his operations and to put the site in a neat, orderly condition; to thoroughly clean and leave reasonably dust-free all finished surfaces on the interior of all buildings included in the contract; and to wash and polish all glass installed under the contract, including the removal of all paint spatters and other defacements.

27. **Schedule of Values.**—Before the first partial payment under the contract becomes due, the Contractor and the Architect shall prepare jointly a schedule of the estimated values of the main branches of the work, totaling the amount of the contract. The values in the schedule will be used only for determining partial payments.

28. **Payments to Contractor.**—(a) Unless otherwise provided in the specifications, the Owner will make partial payments to the Contractor not later than the 15th day of each calendar month on the basis of a duly certified and approved estimate of the work performed during the preceding calendar month, as prepared by the Contractor and approved by the Architect. In preparing estimates, the materials delivered on the site and preparatory work done shall be taken into consideration.

(b) In making such partial (monthly) payments, there shall be retained ten (10) percent on the estimated amounts until final completion and acceptance of all work covered by the contract: provided, however, that the architect may at any time after fifty (50) percent of the work has been completed, if he finds that satisfactory progress is being made and with written consent of surety, recommend that any of the remaining partial payments be paid in full.

(c) Payments for work under subcontracts of the general contractor shall be subject to the above conditions applying to the general contract.

(d) All material and work covered by partial payments made shall thereupon become the sole property of the Owner, but this provision shall not be construed as relieving the Contractor from the sole responsibility for all materials and work upon which payments have been made or the restoration of any damaged work or as a waiver of the right of the Owner to require the fulfillment of all of the terms of the contract.

(e) *Release of Claims.*—Neither the Final Payment nor any part of the retained percentage shall become due until the Contractor shall deliver to the Owner through the Architect a complete release of all claims against the Owner arising under and by virtue of this contract, including claims of all subcontractors and suppliers of either materials or labor, other than such claims, if any, as may be specifically excepted by the Contractor.

(f) *Certificate of Completion.*—Upon completion and acceptance of all work whatsoever required, and the release of all claims against the Owner as specified, the Architect shall file a written certificate with the Owner and with the Contractor as to the entire amount of work performed and compensation earned by the Contractor, including extra work and compensation therefor.

(g) *Final Payment.*—Within thirty (30) days after the filing of such certificate of completion, the Owner shall pay to the Contractor the amount therein stated, less all prior payments and advances whatsoever to or for the account of the Contractor. All prior estimates and payments including those relating to extra work shall be subject to correction by this payment, which is throughout this Contract called Final Payment.

(h) *Acceptance of Final Payment Constitutes Release.*—The acceptance by the Contractor of the Final Payment shall be and shall operate as a release to the Owner of all claims and of all liability to the Contractor for all things done or furnished in connection with this work and for every act and neglect of the Owner and others relating to or arising out of this work, excepting the Contractor's claims for interest upon the Final Payment, if this payment be improperly delayed. No payments, however, final or otherwise, shall operate to release the Contractor or his sureties from any obligations under this contract or the Performance and Payment Bonds.

29. **Contractor's Title to Materials.**—No materials or supplies for the work shall be purchased by the Contractor or by any subcontractor subject to any chattel mortgage or under a conditional sale or other agreement by which an interest is retained by the seller. The Contractor warrants that he has good title to all materials and supplies for which he accepts partial payment.

30. **Payments by Contractor.**—The Contractor shall pay (a) for all transportation and utility services not later than the 20th day of the calendar month following that in which such services are rendered; (b) for all materials, tools, and other expendible equipment to the extent of 90 percent of the cost thereof, not later than the 20th day of the calendar month following that in which such materials, tools, and equipment are delivered at the site of the project, and the balance of the cost thereof not later than the 30th day following the completion of that part of the work in or on which such materials, tools, and equipment are incorporated or used; and (c) to each of his subcontractors, not later than the 5th day following each payment to the Contractor, the respective amounts allowed the Contractor on account of the work performed by his subcontractors, to the extent of each subcontractor's interest therein.

31. **Owner's Right To Stop Work or Terminate Contract; Delays, Damages.**—(a) If (1) the Contractor shall be adjudged bankrupt or make an assignment for the benefit of creditors, or (2) a receiver or liquidator shall be appointed for the Contractor or for any of his property and shall not be dismissed within 20 days after such appointment, or the proceedings in connection therewith shall not be stayed on appeal within the said 20 days, or (3) the Contractor shall refuse or fail, after Notice of Warning from the Architect, to supply enough properly skilled workmen or proper materials, or (4) the Contractor shall refuse or fail to prosecute the work or any part thereof with such diligence as will insure its completion within the period herein specified (or any duly authorized extension thereof) or shall fail to complete the work within said period, or (5) the Contractor shall fail to make payments as specified to persons supplying labor or materials for the work, or (6) the Contractor shall fail or refuse to regard laws, ordinances, or the instructions of the Architect or otherwise be guilty of a substantial violation of any provision of this contract, then, and in any such event, the Owner, upon the certificate of the Architect that sufficient cause exists to justify such action, and without prejudice to any other rights or remedy he may have, may by 10 days' notice to the Contractor, terminate the employment of the Contractor and his right to proceed, either as to the entire work or (at the option of the Owner) as to any portion thereof as to which delay shall have occurred, and may take

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possession of the work and complete the work by contract or otherwise, as the Owner may deem expedient. In such case the Contractor shall not be entitled to receive any further payment on that work until the work is finished. If the unpaid balance of the compensation to be paid the Contractor hereunder shall exceed the expense of so completing the work (including compensation for additional managerial, administrative, and inspection services and any liquidated damages for delay), such excess shall be paid to the Contractor. If such expense shall exceed such unpaid balance, the Contractor and its sureties shall be liable to the Owner for such excess. If the right of the Contractor to proceed with the work is so terminated, the Owner may take possession of any uniform in completing the work such materials, supplies, plant, and equipment as may be on the site of the work and necessary therefor. The expense incurred by the Owner as herein provided, and the damage incurred through the Contractor's default, shall be certified by the Architect.

(b) If the Owner does not terminate the right of the Contractor to proceed, the Contractor shall continue the work, in which event the Contractor shall pay to the Owner as fixed, agreed, and liquidated damages for each calendar day of the delay until work is completed or accepted the amount as set forth in the General Requirements portion of the specification and the Contractor and his sureties shall be liable for the amount thereof.

(c) *Provided* that the right of the Contractor to proceed shall not be terminated, or the Contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable cause beyond the control and without the fault or negligence of the Contractor including, but not restricted to, acts of God or of the public enemy, acts of the Government, acts of the Owner, acts of another contractor in the performance of a contract with the Owner, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather, or delays of subcontractors due to such causes, if the Contractor shall, within ten days from the beginning of any such delay (unless the Owner shall grant a further period of time prior to the date of final settlement of the contract) notify the Owner in writing of the cause of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to arbitration as provided herein.

32. **Contractor's Right To Stop Work or Terminate Contract.**—If through no fault of the Contractor or of anyone employed by him (1) the work is stopped by order of any court or governmental authority, or (2) the Architect fails to issue any certificate for payment within ten days after it is due, or (3) the Owner fails to pay to the Contractor within ten days after its presentation any sum certified by the Architect or awarded by arbitrators, then the Contractor may, upon ten days' written notice to the Owner and the Architect, stop work or terminate the contract, and the Owner shall be liable to the Contractor for any loss sustained and reasonable profit.

33. Engineering and Layout.—(a) The Contractor shall provide competent engineering services to execute the work in accordance with the contract requirements. He shall verify the figures shown on the survey and approach drawings before undertaking any construction work and shall be responsible for the accuracy of the finished work.

(b) The Owner has established, or will establish, such general reference points as will, in his judgment, enable the Contractor to proceed with the work. If the Contractor finds that any previously established reference points have been destroyed or displaced, he shall promptly notify the Owner.

(c) The Contractor shall protect and preserve the established bench marks and monuments and shall make no changes in locations without the written approval of the Owner. Any of them which may be lost or destroyed or which require shifting because of necessary changes in grades or locations shall, subject to prior approval by the Owner, be replaced or reestablished by the Contractor.

34. Drawings.—(a) The general character and scope of the work are illustrated by the drawings listed in the specifications. Any additional detail drawings and other information deemed necessary by the Architect will be furnished to the Contractor with reasonable promptness by the Architect.

(b) In case of differences between small and large-scale drawings, the large-scale drawings shall govern.

(c) Where on any of the drawings a portion of the work is drawn out and the remainder is indicated in outline, the parts drawn out shall apply also to all other like portions of the work.

(d) Where the word "similar" occurs on the drawings, it shall be interpreted in the general sense and not as meaning identical, and all details shall be worked out in relation to their locations and their connection with adjoining parts of the work.

35. Shop Drawings.—(a) The Contractor shall submit, for the approval of the Architect, shop and setting drawings and schedules required by the specifications or that may be requested by the Architect and no work shall be fabricated by the Contractor, save at his own risk, until such approval has been given.

(b) Drawings and schedules shall be submitted in quadruplicate (unless otherwise specified), accompanied by letter of transmittal which shall give a list of the numbers and dates of the drawings submitted. Drawings shall be completed in every respect and bound in sets.

(c) The Contractor shall submit all drawings and schedules sufficiently in advance of requirements to allow ample time for checking, correcting, resubmitting and reconsidering.

(d) The drawings submitted shall be marked with the name of the project, number and country and with the stamp of approval of the Contractor as evidence that the drawings have been checked by the Contractor. Any drawings submitted without the stamp of approval will not be considered and will be returned to the Contractor for resubmission. If the shop drawings show variations from the requirements of the contract because of standard practice or other reason, the Contractor shall make a special mention of such variation in his letter of transmittal in order that, if acceptable, suitable action may be taken for proper adjustment; otherwise the Contractor will not be relieved of the responsibility for executing the work in accordance with the contract even though such shop drawings have been approved.

(e) If a drawing as submitted indicates a departure from the contract requirements which the Architect finds to be in the interest of the Owner and to be recommended that it involve a credit in the contract price or time for performance, he may approve such drawing.

(f) The approval of shop and setting drawings will be general and, except as otherwise provided in paragraph 35(e), above, shall not be construed (1) as permitting any departure from the contract requirements; (2) as relieving the Contractor of the responsibility for the correctness of details, dimensions or otherwise (but may exist); (3) as approving departures from additional details or instructions previously furnished by the Owner.

36. Materials and Workmanship.—Unless otherwise specified, all materials and equipment incorporated in the work under the contract shall be new. All workmanship shall be first-class and by persons qualified in the respective trades.

37. Standards.—(a) Any material specified by reference to the number, symbol or title of a specific standard, such as a Commercial Standard, a Federal specification, a trade association standard, or other similar standard, shall comply with the requirements in the latest revision thereof in any amendment or supplement thereto in effect on the date of invitation for bids except as limited to type, class or grade, or modified in such reference.

(b) The standards referred to, except as modified in the specifications, shall have full force and effect as though

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[illegible] in the specifications. These standards are not furnished to bidders for the reason that the manufacturers and trades involved are assumed to be familiar with their requirements. The Architect will furnish, upon request, information as to how copies of the standards referred to may be obtained.

(c) Notwithstanding any reference in the specifications to any article, device, product, material, fixture, form, or type of construction by name, make, or catalog number, such references shall be interpreted as establishing a standard of quality and shall not be construed as limiting competition; and the Contractor, in such cases, may at his option use any article, device, product, material, fixture, form, or type of construction which in the judgment of the Architect expressed in writing is equal to that specified.

33. Samples.—(a) The Contractor shall furnish for the approval of the Architect any samples required by the specifications or that may be requested by the Architect, of any and all materials or equipment he proposes to use and shall prepay all shipping charges on the samples.

(b) No samples are to be submitted with the bids.

(c) No materials or equipment of which samples are required to be submitted for approval shall be used on the work until such approval has been given by the Architect, save only at the Contractor's risk and expense.

(d) Each sample shall have a label indicating the material represented, its place of origin and the names of the producer, the Contractor and the building or work for which the material is intended. Samples of finished materials shall be so marked as to indicate where the materials represented are required by the drawing or specifications.

(e) A letter in duplicate submitting each shipment of samples shall be mailed under separate cover by the Contractor and contain a list of the samples, the name of the building or work for which the materials are intended, and the brands of the materials and names of the manufacturers.

(f) The approval of any sample shall be only for the characteristics or for the uses named in such approval and no other. No approval of a sample shall be taken in itself to change or modify any contract requirement. When a material has been approved, no additional sample of that material will be considered and no change in brand or make will be permitted. Approved samples of hardware in good condition may be suitably marked for identification and used in the work.

(g) Failure of any material to pass the specified tests will be sufficient cause for refusal to consider, under this contract, any further samples of the same brand or make of that material.

(h) *Test samples* as the Architect may deem necessary, will be procured from the various materials or equipment delivered by the Contractor for use in the work. If any of these test samples fail to meet the specification requirements any previous approvals will be withdrawn and such materials or equipment shall be subject to removal and replacement by the Contractor with materials or equipment meeting the specification requirements, or at the discretion of the Owner the defective materials and equipment may be permitted to remain in place subject to a proper adjustment of the contract price. The costs of the tests will be borne by the Owner except where laboratory tests as hereinafter specified are required by the specifications.

39. Laboratory Tests.—(a) Any specified laboratory tests of material and finished articles to be incorporated in the work shall be made by bureaus, laboratories or agencies approved by the Architect, and the reports of such tests shall be submitted to the Architect. The cost of the testing shall be paid for by the Owner.

(b) The Contractor shall furnish all sample materials required for these tests and shall deliver same without charge to the testing laboratory or other designated agency when and where directed by them.

40. Heating.—The Contractor shall provide heat, fuel, and services as necessary to protect all work and materials against injury from dampness and cold until final acceptance of all work and material in the contract, unless the building or buildings are fully occupied by the Owner prior to such acceptance, in which case the Owner shall assume all expenses of heating from date of occupancy. The Contractor shall provide heat as follows:

(a) At all times during the placing, setting, and curing of concrete, provide sufficient heat to insure the heating of the spaces involved to not less than 50 degrees Fahrenheit.

(b) From the beginning of the application of plaster and during the setting and curing period, provide sufficient heat to produce a temperature in the spaces involved of not less than 50 degrees Fahrenheit.

(c) For a period of ten days previous to the placing of interior wood finish and throughout the placing of this and other interior finishing, varnishing, painting, etc., and until final acceptance of the work or until full occupancy by the Owner, provide sufficient heat to produce a temperature of not less than 70 degrees Fahrenheit.

41. Climatic Conditions.—When so ordered by the Architect, the Contractor shall suspend any work that may be subject to damage by climatic conditions.

42. Extras.—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the Owner and either the price stated in such order or definite acknowledgment made that a change in price is involved subject to later determination.

43. Changes in Work.—(a) The Owner may at any time, by a written order, and without notice to the sureties, make changes in the drawings and specifications of this contract and within the general scope thereof (except that no change will be made which increases the total contract price to an amount more than 20 percent in excess of the original contract price, without notice to sureties). In making any change, the charge or credit for the change shall be determined by one of the following methods as selected by the Owner:

(1) The order shall stipulate the mutually agreed price which shall be added to or deducted from the contract price. If the price change is an addition to the contract price it shall include the Contractor's overhead and profit. On any change which involves a net credit to the Owner, no allowance for overhead and profit shall be figured.

(2) By estimating the number of unit quantities of each part of the work which is changed and then multiplying the estimated number of such unit quantities by the applicable unit price (if any) set forth in the contract or other mutually agreed unit prices. The number of calendar days (if any) required to complete the modification shall be noted in the contractor's proposal.

(3) By ordering the Contractor to proceed with the work and to keep and present in such form as the Owner may direct a correct account of the cost of the change together with all vouchers therefor. The cost may include an allowance for overhead and profit not to exceed 15 percent of the net cost. The cost may also include all items of labor or materials, the use of power tools and equipment actually used, power and all items of cost such as public liability and workmen's compensation insurance, pro rata charges for foremen, also social security, old-age and unemployment insurance; however, no percentage for overhead and profit shall be allowed on the items of social security, old-age and unemployment insurance. If deductions are ordered, the credits shall be the net cost. Among the items considered as overhead are included insurance other than mentioned above, bond or bonds, superintendent, timekeeper, clerks, watchman, use of small tools, incidental job burdens, and general office expenses.

(b) Under methods (a-1) and (a-3) the Contractor's proposal shall include a complete itemization, indicating separately: (1) Quantities of material, (2) unit cost of

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materials, (5) total hours for each classification of labor, (4) hourly rates applicable for all labor classifications, (5) Social Security, Old Age, and Unemployment Insurance, (6) Contractor's allowance for overhead and profit, and (7) number of calendar days (if any) required to complete the additional work.

(c) In figuring changes, instructions for measurement of quantities set forth in the specifications shall be followed.

(d) If any part of the work as installed be at variance with the contract requirements, the Owner may, if he finds it to be in his interest, allow all or any part of such work to remain in place, subject to a proper adjustment in the contract price.

44. Taxes.—The Contractor shall, without additional expense to the Owner, pay all applicable Federal, State, and local sales and other taxes, except taxes and assessments on the real property comprising the site of the project.

45. Patents.—The Contractor shall hold and save the Owner and his officers, agents, servants, and employees harmless from liability of any nature or kind, including cost and expenses, for or on account of any patented or unpatented invention, process, article, or appliance manufactured or used in the performance of the contract, including its use by the Owner, unless otherwise specifically stipulated in the Contract Documents.

46. Assignments.—The Contractor shall not assign the whole or any part of this contract or any monies due or to become due hereunder without the written consent of the Owner and of all sureties executing any bonds on behalf of the Contractor, in connection with said contract. In case the Contractor assigns the whole or any part of said contract or assigns all or any part of any monies due or to become due under said contract, the instrument of assignment shall contain a clause substantially to the effect that it is agreed that the right of the assignee in and to any monies due or to become due the Contractor, or otherwise, shall be subject to all of the terms and conditions of said contract and of all instruments that are now or may hereafter be amendatory thereof or supplemental thereto, the rights and remedies of the Owner thereunder or arising by operation of law and to the liens of all persons, firms, and corporations for services rendered or materials supplied in connection with the performance of said contract.

47. Specifications and Drawings.—(a) The Contractor shall keep on the work a copy of the drawings and specifications including all addenda and authorized change orders and shall at all times give the Owner, Architect, State agencies (on projects included in 1(b) page 2), and the Surgeon General and their authorized representatives access thereto.

(b) All drawings and specifications and copies thereof furnished by the Architect are his property and shall not be used on other projects without his consent. Upon completion of this project all copies of the drawings and specifications except the signed contract sets are to be returned to the Architect upon his request.

48. Materials, Services, and Facilities.—It is understood that except as otherwise specifically stated in the Contract Documents, the Contractor shall provide and pay for all materials, labor, tools, equipment, water, light, power, transportation, superintendence, temporary construction of every nature and all other services and facilities of every nature whatsoever necessary to execute, complete, and deliver the work within the specified time.

49. Superintendence by Contractor.—The Contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the Architect, on the work at all times during progress, with authority to act for him.

50. Inspection.—(a) All material and workmanship (if not otherwise designated by the specifications) shall be subject to inspection, examination, and test by the Architect at any and all times during manufacture and/or construction and at any and all places where such manufacture and/or construction are carried on. The Architect shall have the right to reject defective material and workmanship or require its correction. Defective workmanship shall be satisfactorily corrected, and rejected material shall be satisfactorily replaced with proper material without charge therefor, and the Contractor shall promptly segregate and remove the rejected material from the premises. If the Contractor fails to proceed at once with the replacement of rejected material and/or the correction of defective workmanship, the Owner may, by contract or otherwise, replace such material and/or correct such workmanship and charge the cost to the Contractor, or may terminate the right of the Contractor to proceed as provided in paragraph 31, above, the Contractor and Surety being liable for any damage to the same extent as provided in said paragraph 31 for termination thereunder.

(b) The Contractor shall furnish promptly, without additional charge, all reasonable facilities, labor, and materials necessary for the safe and convenient inspection and tests that may be required by the Architect. All inspections and tests shall be performed in such manner as not unnecessarily to delay the work. Special, full-size, and performance tests shall be as described in the specifications. The contractor shall be charged with any cost of inspection when material and workmanship is not ready at the time inspection is requested by the Contractor.

(c) Should it be considered necessary or advisable by the Architect at any time before final acceptance of the entire work, to make an examination of work already completed by removing or tearing out same, the Contractor shall on request promptly furnish all necessary facilities, labor, and material. If such work is found to be defective in any material respect, due to the fault of the Contractor or his subcontractors, he shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, the actual cost of labor and material necessarily involved in the examination and replacement, plus 15 percent, shall be allowed the Contractor and he shall, in addition, if completion of the work has been delayed thereby, be granted a suitable extension of time on account of the additional work involved.

51. Final Inspection.—When the work is substantially completed the Contractor shall notify the Owner, in writing, that the work will be ready for final inspection and test on a definite date which shall be stated in such notice. The notice shall be given at least ten (10) days in advance of said date and shall be forwarded through the Architect who will attach his endorsement as to whether or not he concurs in the Contractor's statement that the work will be ready for final inspection or test on the date given, but such endorsement shall not relieve the Contractor of his responsibility in the matter.

52. Guarantee of Work.—(a) Except as otherwise specified all work shall be guaranteed by the Contractor against defects resulting from the use of inferior materials, equipment, or workmanship for one year from the date of final completion of the contract, or from full occupancy of the building by the Owner, whichever is earlier.

(b) If, within any guarantee period, repairs or changes are required in connection with guaranteed work, which, in the opinion of the Architect, is rendered necessary as the result of the use of materials, equipment, or workmanship which are inferior, defective, or not in accordance with the terms of the contract, the Contractor shall, promptly upon receipt of notice from the Owner, and without expense to the Owner—

(1) place in satisfactory condition in every particular all of such guaranteed work, correct all defects therein; and

(2) make good all damage to the building or site, or equipment or contents thereof, which, in the opinion of the Architect, is the result of the use of materials, equipment, or workmanship which are inferior, defective, or not in accordance with the terms of the contract; and

(3) make good any work or material, or the equipment and contents of said building or site disturbed in fulfilling any such guarantee.

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(b) In any case wherein fulfilling the requirements of the contract or of any guarantee, embraced in or required thereby, the Contractor disturbs any work guaranteed under another contract, he shall restore such disturbed work to a condition satisfactory to the Architect and guarantee such restored work to the same extent as it was guaranteed under such other contract.

(c) If the Contractor, after notice, fails to proceed promptly to comply with the terms of the guarantee, the Owner may have the defects corrected and the Contractor and his surety shall be liable for all expense incurred.

(d) All special guarantees applicable to definite parts of the work that may be stipulated in the specifications or other papers forming a part of the contract shall be subject to the terms of this paragraph during the first year of the life of such special guarantee.